STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
W.C. No. 4-334-784

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD); medical maintenance benefits (*Grover* medicals); bodily disfigurement; offsets for receipt of Federal Social Security disability benefits (SSDI); and, Respondents' affirmative claim for interest, based on an overpayment of Colorado temporary total disability (TTD) benefits because the Social Security Administration (SSA) erroneously offset Colorado TTD benefits against Claimant's SSDI benefits from May 1, 2000, through April 2008 and, after the SSA reversed itself in April 2008, it made a retroactive payment of $22,291 to the Claimant. Respondents contend that they are equitably entitled to interest on this sum because they were deprived of the opportunity of taking contemporary offsets from May 1, 2000 through April 2008, if the SSA had been correctly applying the Colorado law permitting offsets of SSDI benefits against Colorado disability benefits.

At the commencement of the hearing, the parties stipulated to the following: (1) Claimant is entitled to all authorized and reasonably necessary *Grover* medicals; (2) Respondents have offered the Claimant vocational rehabilitation as an alternative to PTD, pursuant to the provisions of Section 8-42-111 (3), C.R.S. (2008); while the Claimant was living in North Carolina, the SSA off set her Colorado TTD benefits against her SSDI benefits under the law of North Carolina, in the aggregate amount of $22,291. The ALJ accepts these stipulations and finds them to be fact.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was awarded SSDI benefits as of May 1, 2000. The parties stipulated that the monthly amount awarded in May 2000 was $509.90, and the ALJ so finds.

2. When SSDI benefits were awarded to the Claimant, North Carolina's law was applied so that Claimant's Colorado workers compensation benefits were fully offset. Therefore, after the erroneous offset, Claimant received no payments of SSDI benefits from May 1, 2000 through April 2008.

3. In April 2008 the SSA agreed that Colorado's "reverse jurisdiction" law applies to Claimant's SSDI benefits. Accordingly, Claimant became entitled

to payment of full SSDI benefits, thereby entitling SCA Claims Management to the 50 % offset provided by Section8-42-103 (1) (c) (I), C.R.S. (2008).

4. At the time the SSA in North Carolina determined that Colorado law applied, Claimant had received cost-of-living increases raising her monthly SSDI benefit as of December 2007 to $704.00 per month.

5. The ALJ finds, however, that the amount of Claimant's initial award of SSDI benefits was $509.90. Based on this initial award, the offset for SSDI benefits calculates to $58.83 per week.

6. Claimant repaid $22,291.00 to SCA Claims Management for the overpayment of workers compensation resulting from her retroactive award of SSDI benefits. SCA Claims Management has been fully repaid through June 30, 2008.

7. To date, Respondents have not taken any offset for SSDI benefits. Claimant agreed to repay the overpayment of workers compensation benefits from July 1, 2008 through October 31, 2008, in one lump sum payment to SCA Claims Management. Thereafter, Respondents may take the 50 % offset against weekly benefits, pursuant to Section 8-42-103 (1) (c) (I), C.R.S. (2008).

8. Respondents concede that Claimant fully cooperated with Respondents in correcting the applicability of the North Carolina SSDI offset for workers' compensation benefits and the Claimant engaged in **no** wrongful acts, and the ALJ so finds.

9. The Claimant reached maximum medical improvement on **November 10, 2005.**

10. The parties stipulated, and the ALJ finds, maintenance medical benefits as recommended by her authorized treating care providers, including Dr. Jackson, Dr. Powers, Gastonia Pain Clinic and Dr. Kallenbach, are causally related to her compensable injury and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Facts, the ALJ makes the following Conclusions of Law:

Social Security Disability Benefits

1. Section 8-42-103(1)(c)(I), C.R.S. (2008), provides that workers' compensation benefits shall be reduced by one-half of Social Security disability benefits. Respondents contend that because Colorado law concerning the offset was not properly applied to Claimant's SSDI benefits until 2008 they are entitled to the offset based on the SSDI

award amount established in December 2007, which encompassed annual cost-of-living adjustments (COLAs) since May 1, 2000. In *Engelbrecht v. HartF Accident and Indemnity Co.*, 680 P.2d 231 (Colo. 1984), the Colorado Supreme Court held that only the initial award of SSDI benefits is subject to the 50 % offset. COLAs can never be offset. Therefore, the 50 % offset against SSDI benefits is established as of May 1, 2000, at the monthly rate of $509.90. The offset for 50 % of Claimant's SSDI benefits, provided by Section 8-42-103 (1) (c) (I), C.R.S. (2008), is $58.83 per week.

Interest Payable by Claimant

2. Section 8-43-410(2), C.R.S. (2008), provides:

> Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum on all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. . . .

Section 8-43-410(2), C.R.S. (2008), provides for interest payable only by the insurer, not the injured worker. Because of this, Respondents argue, the statute's failure to require an injured worker to pay interest is inequitable. The Workers' Compensation Act is silent on payment of interest by the injured worker. Consequently, Respondents argue that there should be a "default" to the Colorado Consumer Credit Code, Title 5. Respondents cite Section 5-12-102(1)(a), C.R.S. (2008), which provides that creditors shall receive interest:

a. [w]hen money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property . . .

b. Section 5-12-102(2), C.R.S. (2008), provides that when there is no agreement as to the interest rates, creditors can receive interest at the rate of 8 percent per annum compounded annually. As found, Claimant fully cooperated with Respondents in correcting the applicability of the North Carolina SSDI offset for workers' compensation benefits and the Claimant engaged in **no** wrongful acts.

3. Respondents also cite Section 8-42-113.5(1)(a) C.R.S. (2008), arguing that Claimant had a duty to notify Respondents, in a timely fashion, of her *eligibility* for SSDI benefits:

> Within twenty calendar days after learning of **such payment, award, or entitlement**, the claimant . . . shall give written notice of the payment, award, or entitlement to the employer or, if the employer is insured, to the employer's insurer. . .

[Emphasis supplied]

There is no provision in the Workers' Compensation Act requiring an injured worker to pay interest on any overpayment of workers' compensation bene-

fits. Colorado appellate courts have uniformly held that non-existent provisions cannot be read into the Workers' Compensation Act. See *Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985). Clearly, to find an obligation for an injured worker to pay interest on an overpayment of SSDI benefits is an issue properly for the General Assembly, not the ALJ. The same reasoning applies to Respondents' argument that Claimant had a duty to provide notice of her eligibility for SSDI.

4. Respondents argue that it is inequitable to have deprived them of the ability to take contemporaneous offsets against Claimant's entitlement to TTD benefits from May 1, 2000 through April 2008 (although Claimant received zero in SSDI benefits during this period of time because of the erroneous offset of Colorado TTD benefits against Claimant's SSDI benefits). The equitable jurisdiction of statutory judges (ALJs who decide workers' compensation cases) is limited to instances were it has either been conferred by statute or case law. *See Garrett v. Arrowhead Improvement Association,* 826 P.2d 850 (Colo. 1992). The specified instances of equitable jurisdiction include average weekly wage determinations when specific statutory methods would be inequitable conferred by statute, Section 8-42-102 (3), C.R.S. (2008); application of the equitable doctrine of "claim preclusion" [*See W v. Industrial Claim Appeals Office (ICAO),* 862 P.2d 1007 (Colo. App. 1993)]; application of the "law of the case" doctrine [*See Cooper v. ICAO,* 998 P.2d 5 (Colo. App. 1999)]; application of the doctrine of "estoppel" [*See Verzuh v. Rouse,* 660 P.2d 1301 (Colo. App. 1982)]; application of the doctrine of "laches" [*See Bacon v. ICAO,* 746 P.2d 74 (Colo. App. 1987)]; and, application of the doctrine of "waiver" [*See Johnson v. ICAO,* 761 P.2d 1140 (Colo. 1988). The ALJ concludes that equitable jurisdiction to award interest to Respondents and against the Claimant is lacking because there is no express statutory authority to do so, and there is no case law concerning an equitable award of "interest," which is a creature of statute. Also, to require the Claimant to pay Respondents interest on the retroactive payment of the $22,291 in SSDI benefits, which Claimant immediately repaid to SCA Claims Management on receipt thereof from the SSA, would effect an inequitable result against the Claimant who, as found, was not a fault for the SSA's erroneous application of North Carolina offset provisions. As found, there is no overpayment through June 30, 2008 because Claimant has fully repaid the insurer for the retroactive SSDI benefits. Since July 1, 2008 the fact that any overpayment may exist is because Respondents, despite being notified of the award, failed to begin taking the 50 %offset.

***Grover* Maintenance Medical Care**

5. An employee is entitled to continuing medical benefits after maximum medical improvement if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus-*

trial Claim Appeals Office, 916 P.2d 609 (Colo. App. 1995); *Grover v. Industrial Commission, supra*. As found, Claimant reached MMI on **November 10, 2005,** and she is entitled to maintenance medical care, which is reasonable and necessary to address the injury. As found, Claimant is entitled to maintenance medical benefits as recommended by her authorized treating care providers, who include Dr. Jackson, Dr. Powers, Gastonia Pain Clinic and Dr. Kallenbach.

Permanent Total Disability

6. As found, Respondents have Claimant offered vocational rehabilitation, pursuant to Section 8-42-111 (3), C.R.S. (2008), as an alternative to a determination of PTD at the present time, and Claimant has accepted this offer. Accordingly, the issue of PTD is premature for determination.

7. Section 8-42-105(1), C.R.S. (2008), requires payment of TTD benefits when vocational rehabilitation is offered and accepted. *See also Larimer County v. Sinclair*, 939 P.2d 515 (Colo.App. 1997). Therefore, Claimant is entitled to temporary total disability benefits beginning **November 10, 2005**, the time when Claimant reached MMI and continuing during vocational rehabilitation.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall provide the Claimant with ongoing maintenance medical benefits that are reasonably necessary and causally related to her industrial injury as recommended by her authorized treating care providers, including Dr. Jackson, Dr. Powers, Gastonia Pain Clinic and Dr. Kallenbach.

B. Respondents shall pay the Claimant temporary total disability benefits of $359.33 per week from **November 10, 2005** and continuing during her vocational rehabilitation.

C. Respondents are entitled to a weekly offset of **$58.83** for Claimant's receipt of Federal Social Security Disability benefits, continuing pursuant to law.

D. Respondents' request for interest payable by Claimant to Respondents is hereby denied and dismissed.

E. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

_____ day of November 2008. EDWIN L. FELTER, JR.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
W.C. No. 4-753-134

ISSUES

The issues to be determined by this decision concern compensability, medical benefits, temporary total disability (TTD) benefits and average weekly wage (AWW). The parties stipulated that the AWW was $380.00, thus, the TTD rate is $253.33 per week. Claimant bears the burden of proof, by a preponderance of the evidence, on all issues heard.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed in the Property Management Department of Employer. Claimant's job responsibilities included cleaning public access areas, performing snow and ice removal, and other similar duties.

2. Claimant resides in Silverthorne, Colorado. In order to reach her place of employment the Claimant must drive, carpool or ride the bus to Copper Mountain Ski Resort.

3. Employer provides parking for employees based on the expected level of visitors to the ski resort. Normally, Claimant must park in the Alpine Lot. However, when attendance is expected to be lower, Claimant may park in the Chapel Lot. An orange flag at the entrance to the resort signals employees as to when the Chapel Lot is available for employee parking.

4. Claimant drove to Copper Mountain Ski Resort on February 28, 2008. Upon arrival Claimant saw the orange flag and parked in the Chapel Lot.

5. Claimant sustained an injury on February 28, 2008, when she slipped on ice and fell outside the Village Square Hotel en route to her assignment meeting, located in the Mountain Plaza Hotel. This injury arose out of and was within the course and scope of her employment.

6. Claimant's supervisor found her on the ground and he had the Claimant transported by the Summit County Ambulance Service to the Copper Mountain Clinic of St. Anthony's hospital for medical treatment where she saw Timothy Keeling, D.O. Respondents made a first selection of St. Anthony's Hos-

pital and Dr. Keeling. The fall resulted in Claimant fracturing and dislocating her left elbow. At the hospital, Claimant's fracture was reduced and follow-up with an orthopedic physician was ordered. All of Claimant's medical care and treatment was within the chain of authorized referrals.

7. Claimant has been unable to follow-up with an orthopedic physician because she does not have insurance or the money to pay for physical therapy. She saw a doctor in Mexico at her own expense, but this was not within the chain of authorized referrals.

8. Claimant has not worked since her accident. Until she completes physical therapy the Claimant's use of her left arm is fully restricted. She has not earned any wages nor has she been released to return to full duty since the compensable accident. Also, she has not been declared to be at maximum medical improvement (MMI).

9. Claimant's testimony was credible, persuasive and it was not contradicted by any other testimony or evidence. Claimant convincingly exhibited inflexibility and weakness in her left arm, as well as pain in her left elbow, wrist and neck.

10. Claimant has proven, by a preponderance of the evidence that her left elbow, wrist and neck pain and limited use of her left arm is causally related to the injury of February 28, 2008; that medical care and treatment for this condition is reasonably necessary to cure and relieve the effects of Claimant's injury; and, that all medical care reflected in the evidence is authorized; and, that she has not been released to return to full duty, has been sustaining a 100% temporary wage loss since the date of the accident, and she has not been declared to be at MMI. Therefore, she has proven by preponderant evidence that she has been TTD since the date of the compensable accident.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Generally, "harm or injury sustained by an employee while going to or from his work is not compensable." *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 373, 423 P.2d 2, 5 (1967). However, several exceptions to this rule have been recognized. *Id.* Rather than resort to a list of exceptions, the proper approach to determine whether an exception to the "going to or coming from work" rule exists is to consider a number of variables. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 864 (Colo. 1999). "These variables include but are not limited to: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or

conditions of employment created a "zone of special danger" out of which the injury arose." *Id.*

b. Specifically, "[t]he fourth variable, the zone of special danger, refers to injuries that occur off an employer's premises but so close to the zone, environment, or hazards of such premises as to warrant recovery…" *Id.* at 865. For example, recovery has been allowed for accidents occurring on public streets, crossed from employer-provided parking to the place of employment. *Id.* The rule arising in that instance provides, "[w]here a parking lot constitutes a part of an employer's premises, or is provided by him, and an injury is sustained by an employee in a fall, or otherwise, while in such lot or while passing between it and his working place, or area, such injury has been held…to arise out of, or in the course of, the employment…" *State Compensation Ins. Fund v. Walter*, 143 Colo. 549, 555, 354 P.2d 591, 594 (1960) (citing and adopting the rule as stated in 99 C.J.S. Workmen's Compensation § 234, page 833). As found, Claimant's situation is similar to that described above. While walking from Chapel Lot, which was provided by the employer, to her place of work, Claimant sustained an injury in a fall. Thus, Claimant's injuries fall within the zone of special danger variable.

c. "Whether meeting one of the variables is sufficient, by itself, to create a special circumstance warranting recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment." *Madden*, at 865. As found, the evidence produced by Claimant at hearing demonstrated the necessary causal connection between her employment and the injury suffered.

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Section 8-43-201, C.R.S. (2008). *See also, City of Boulder v. Streeb,* 706 P.2d 786, 789 (Colo. 1985). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 318, 592 P.2d 792, 800 (1979). *Also see, Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden of proof.

e. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential*

ins. Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, Claimant's testimony was reasonable, not contradicted and credible.

f. Respondent is liable for medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42-101(1)(a), C.R.S. (2008). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits are sought. *See*, *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *See*, *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). As found, Claimant has established a causal relationship between her work-related injury and the condition for which benefits were sought.

g. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, [Industrial Claim Appeals Office (ICAO), December 18, 2000]. Claimant's termination in this case was because she was medically restricted from performing her full duties.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and there is no actual return to work TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has not been released to full duty, she has been sustaining a 100% temporary wage loss, she has not been offered modified employment, and she has not been declared to be at MMI. Therefore, as found, she has been TTD since the date of injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay for all medical benefits with regard to the Claimant's left elbow, wrist and neck pain, and the limited use of her left arm that are authorized, reasonably necessary, and causally related to the her injuries oc-

curring on February 28, 2008. The medical costs shall not exceed the amounts permitted by the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits of $253.33 per week, or $36.19 per day, from February 29, 2008 through September 25, 2008, both dates inclusive, a total of 1771 days, in the aggregate amount of $6,188. 49,which is payable retroactively and forthwith. From September 26, 2008 until the conditions for cessation or modification of temporary disability benefits occur, Respondents shall continue paying the Claimant $**253.33** per week in temporary total disability benefits.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

_____ November 2008.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-392-766

ISSUE

The sole issue for determination in this order is permanent total disability (PTD) benefits.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her cervical spine on July 21, 1998. Claimant has reached maximum medical improvement (MMI).
2. Claimant was born in October 1968. At the time of the hearings she was 39 years old. Claimant has an eleventh grade education and no G.E.D. Claimant has attended some post-high school classes. Most of her employment history is in very physically demanding jobs. She was working in a very physically demanding job at the time of this injury.
3. After a surgery in July 2002, Claimant did light work at home for her husband's business. This work included working on a computer, payroll, running errands, and preparing bids. She also worked as a receptionist in a doctor's office and at a health club. She last worked in July 2004 when she left her part-time employment at the health club.
4. Claimant testified that she left her employment at the health club because her pain was so severe. She testified that she had excruciating neck pain and that she did not do anything to increase her neck symptoms. She testified that her condition has

gotten even worse since July 2004. She testified that she has pain and that this affects her concentration. She testified that she has good days and bad days. She testified that on bad days all she can do is go from the bed to the couch. She testified that she has headaches, neck aches, aches down into her arms and hands, pain in her shoulder blades, across her back, and down into her hips. She testified that her medications slow down her thinking. She testified that she can stand only one hour or walk thirty minutes, and that would be with pain. She testified that she can sit one-half to one hour. She testified that she cannot sit with her head in a flexed position. She testified that her sleep is affected. She testified that she did her best at an FCE.

5. Dr. Lawrence Lesnak testified that there were inconsistencies in Claimant's clinical presentations. In his August 30, 2007, report he stated that Claimant had multiple pain behaviors and non-physiologic findings. He stated that her complaints suggest a significant degree of somatization and functional overlay. He stated that when Claimant left work there were no intervening events that would have caused any decreased functional status and that Claimant's examination was extremely non-physiologic in nature. He stated that the November 2004 video tape suggests that Claimant's subjective reports and reports of her functional ability to her health care providers were not accurate. He stated that Claimant's subjective complaints were not reliable. He testified that activities shown in a November 2004 video were inconsistent with the medical records from that time. Dr. Lesnak testified that there were no objective changes before and after she left employment in July 2004. He testified that Clamant exhibited pain behavior, which is an unexpected result that has no anatomic or physiologic basis. He noted that there was no significant changes in her range of motion before 1998, in 1999, and in 2007, so there should be no changes in her restrictions between those dates. Dr. Lesnak testified that Claimant embellishes her symptoms and what she says about her pain levels is unreliable.

6. Dr. Michael Janssen examined Claimant once and met with her on four occasions between August and November 2004. In his November 18, 2004, report he stated that Claimant's subjective symptoms and generalized illness behavior far exceeded any obvious anatomical, radiographic, or clinical pathology. In his report of March 27, 2005, he stated that he had reviewed the November 2004 video, and that it clearly showed a discrepancy in the subjective complaints. He stated that there was no anatomical or objective pathology to support Claimant's ongoing subjective complaints. He testified that Claimant's subjective complaints do not match her clinical objective pathology. He testified that he reviewed the video, and her presentation on the November 2004 video was not consistent with her complaints in November 2004.

7. Dr. Woodcock is an authorized treating physician. He first treated Claimant in early 2004. He has continued to provide controlled substances for her pain, and has used a medication contract. He testified that Claimant's pain has been consistent over time and there is objective evidence and significant pathology, although there is non-physiologic pain behavior. He testified that Claimant's pain is so severe and impairing that she cannot be employed on a regular basis. He testified that he reviewed the video tapes and that they were not inconsistent with what Claimant told him she could do. He testified that Claimant exaggerated her symptoms, but was not malingering.

8. It is found that Claimant has significant functional overlay and exaggerates her symptoms. Claimant's testimony and her reports to her physicians as to the extent of her pain and impairment are not credible.

9. Dr. Woodcock took Claimant off work in July 2004. In his report he stated that Claimant had an acute exacerbation of neck pain with unknown etiology. He testified that her pain complaints were worse. He testified that objective tests showed no change, and that he did not know why she was worse. He testified that her cervical range of motion did not change between 1997 and 2006.

10. Dr. Lesnak testified that Claimant's symptoms were the same before and after she was taken off work in July 2004, and that tests afterward showed no objective changes. Dr. Reiss, in his November 2, 2005, report stated that Claimant was better than in 2004. Dr. Lockwood, in his April 6, 2006, report stated that Claimant has been stable since December 2002.

11. Claimant underwent an assessment of her functional capacity on August 22, 2006, at O. T. Resources. The assessment was performed by Marie Andrews, OTR. Doris Shriver, OTR, FOATA, QRC, reviewed the assessment and prepared a report. In the report, and in her testimony, Shriver stated that Claimant's one time maximum lift was 5 to 10 pounds, her maximum occasional lift was 2 to 5 pounds, and that Claimant could not do any frequent or continuous lifting. Shriver stated that Claimant's maximum sit, stand, and walk was 30 to 60 minutes, and that Claimant's maximum hand use was for two hours. Another significant finding of Shriver was that Claimant was at the less than one percentile for overall fine motor and gross motor coordination. Shriver did not do significant objective validity testing; rather, she based her opinions on her clinical observations and judgment. In her report, Shriver referred to studies that showed that clinical observation and judgment of the subject during testing was more accurate in assessing effort than the best statistical analysis.

12. Sherry Plumer, OTR, CFCE, evaluated Claimant and prepared a report on October 24, 2007. Plumer stated that Claimant was capable of lifting 10 to 15 pounds occasionally, push/pull with 25 pounds of force, frequently sit, and occasionally stand, walk, climb stairs, and kneel. She reported that Claimant could bend up to 20% of the time. She stated that Claimant could do constant light grasping and light pinching, frequent medium grasping and medium pinching. She stated that Claimant could do occasional poser grasping, power pinching, fingering or typing, and writing. Under "Interpretation of Findings," Plumer stated that Claimant demonstrated high effort, and that her subjective reports were consistently reliable, but that Claimant may, on occasion, have a tendency to overestimate her physical abilities. She stated that her interpretation was based on Claimant's subjective report of pain and physical abilities compared to objective clinical observation during both distracted and undistracted activities.

13. Dr. Lesnak criticized the report of O. T. Resources. He stated that the report and its conclusions were based on subjective opinions rather than objective evidence. Dr. Lesnak also stated that the FCE of Plumer had some validity checks, but that her conclusions appear not to be based on objective evidence but rather patient effort. Dr. Lesnak testified that one or two validity checks are not enough and that one should have four to six validity checks. This testimony of Dr. Lesnak is credible and persuasive.

14. The Claimant's physical restrictions provided by Shriver at O. T. Resources and Plumer are not persuasive. Dr. Woodcock's opinion in July 2004 that Claimant could no longer perform the work she was performing at that time is not persuasive.
15. Dr. Lockwood provided care for Claimant through 2002. In December 2002, he noted that Claimant was employable "in at least a sedentary work capacity." In April 2006, Dr. Lockwood, after an examination and record review, stated that Claimant's condition had been stable since December 2002.
16. Dr. Lesnak examined Claimant on August 30, 2007, and performed a medical records review. He stated that it was medically safe for Claimant to work in the sedentary to light work category.
17. Claimant testified that she is not capable of employment. Dr. Woodcock has stated in numerous reports that Claimant is not capable of competitive employment. Shriver has stated that Claimant cannot sustain work as a reliable worker, is unable to sustain work postures, is academically cognitively limited, and has limited hand skills. These opinions rely too much on Claimant's subjective complaints, which are not reliable. These opinions are not persuasive.
18. The opinions of Dr. Woodcock and Dr. Lesnak are credible and persuasive. Claimant is capable of performing work in the sedentary to light work category.
19. Shriver performed a vocational evaluation. She concluded that Claimant was not capable of employment. She based that conclusion on her opinion that Claimant was not capable of performing even sedentary work. The opinion of Shriver is not persuasive.
20. It is found that there has been no significant change in Claimant's ability to function after June 2004. Everything that Claimant was able to do from her surgery in 2002 to July 2004, she was able to do as of the date of the hearing. Claimant is capable of employment as a receptionist in a medical office and as a receptionist at a health club.
21. Kate Montoya performed a vocational evaluation, prepared a report, and testified at the hearing. Based on the restrictions of Dr. Lesnak, Montoya opined that Claimant was capable of employment in receptionist and clerical positions, counter attendant position, and some cashier positions. In a report dated December 18, 2007, Dr. Lockwood stated that Claimant could perform the duties of employment in the fields suggested by Montoya. The opinion of Montoya is credible and persuasive.
22. Employment is reasonably available to Claimant under her particular circumstances. Claimant is capable of earning wages in competitive employment.

CONCLUSIONS OF LAW

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." The burden of proof to establish permanent total disability is on the claimant. In determining whether the claimant has sustained his burden of proof, the ALJ may consider those "human factors" that define the claimant as an individual. *Christie v. Coors Transportation Co.,* 933 P.2d 1330 (Colo. 1997). These factors may include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The overall objective of this standard is to determine whether, in view of all of these factors, employ-

ment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, 955 P.2d at 558.

Claimant has failed to establish by a preponderance of the evidence that employment is not available to her under her particular circumstances. Claimant is capable of earning wages. Claimant is not permanently and totally disabled.

ORDER

It is therefore ordered that Claimant's request for permanent total disability benefits are denied.

All matters not determined herein or by prior orders or admissions are reserved for future determination.

DATED*: November 26, 2008* Bruce Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-534-254

ISSUES

The issues determined herein are petition to reopen, temporary total disability ("TTD") benefits, and average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by the employer as an industrial maintenance engineering technician. He was required to engage in lifting in the course of maintaining the equipment on the production floor, the hydraulics, the pneumatics, the robotics, and the HVAC system.

2. On June 17, 2001, claimant suffered an admitted work injury to his low back.

3. On December 18, 2001, Dr. Sceats performed a microdiscectomy surgery.

4. On February 7, 2002, claimant's authorized treating physician determined that he was at maximum medical improvement ("MMI").

5. In approximately March 2002, three months after the surgery, claimant began to suffer increased muscle spasms and some bladder incontinence.

6. On August 19, 2002, the insurer filed a final admission of liability terminating TTD benefits on February 7, 2002, admitting for permanent partial disability benefits through July 25, 2002, and admitting for post-MMI medical benefits.

7. Claimant continued to have low back and leg pain after MMI. On April 10, 2003, Dr. Sandell examined claimant and then began to provide post-MMI medical treatment.

8. On July 17, 2003, claimant reported to Dr. Sandell that he had suffered increased pain and some urinary incontinence since about three months after the surgery.

9. On March 26, 2004, Dr. Sandell documented the possibility of a worsening of condition on the part of claimant.

10. On May 6, 2004, Dr. Sandell noted that claimant had worsening low back pain and left leg pain. On May 28, 2004, Dr. Sandell noted a "new" symptom of loss of bladder control.

11. On August 17, 2004, claimant reported to Dr. Sandell that he had suffered increased low back pain and muscle spasm for about one month.

12. On November 9, 2004, Dr. Sandell concluded that claimant had significantly increased low back pain.

13. On August 5, 2005, Dr. Sandell noted that claimant was experiencing pain radiating into the left leg. Dr. Sandell noted that the last epidural steroid injection had not helped and that claimant might be worsening.

14. On June 26, 2006, claimant had an epidural steroid injection that was largely ineffective.

15. Dr. Sandell expressed concern that there may have been a change in the underlying anatomy.

16. On July 11, 2006, Dr. Sandell noted increased low back pain and radicular left leg pain. He referred claimant for a new magnetic resonance image ("MRI").

17. On August 9, 2006, Dr. Sandell noted that the new MRI showed worsening of the L5-S1 disc. He referred claimant back to Dr. Sceats to be surgically re-evaluated.

18. Dr. Sceats did not recommend any surgery.

19. On September 15, 2006, Dr. Sandell referred claimant for a second surgical opinion with Dr. Sung, but the insurer denied authorization for that examination.

20. On June 5, 2007, claimant filed a Petition to Reopen based upon a change of condition. Respondents filed an objection to the petition.

21. On August 22, 2007, Dr. Sung examined claimant and diagnosed severe collapse at L5-S1 with degeneration. Dr. Sung recommended a new MRI, which was completed on October 24, 2007. The new MRI showed significant degeneration at L5-S1 with some mild neural foraminal narrowing and disc bulging. Dr. Sung recommended a discogram, which was performed on February 25, 2008.

22. On April 3, 2008, Dr. Sung recommended fusion surgery at L5-S1.

23. On May 20, 2008, Dr. Sung performed an L5-S1 anterior lumbar interbody fusion.

24. On June 17, 2008, Dr. Sandell wrote that claimant was no longer at MMI as of April 3, 2008, when the surgical recommendation was made.

25. As of October 20, 2008, Dr. Sandell still had not released claimant to return to work.

26. Claimant filed a timely petition to reopen prior to six years from the date of his injury.

27. Claimant has proven by a preponderance of the evidence that he suffered a change of condition after MMI as a natural consequence of the work injury. The record evidence demonstrates that claimant started suffering a change of condition as early as three months after his first surgery. By August 2006, claimant clearly had suffered a significant worsening of his condition, as demonstrated on the MRI. Although the surgical recommendation did not occur until April 3, 2008, claimant's condition had worsened long before that recommendation. Dr. Sandell noted the worsening and wanted the second surgical evaluation by Dr. Sung. The insurer caused an eight-month delay in obtaining the evaluation by Dr. Sung.

28. Claimant has been unable to return to his usual job as of the date of injury due to his admitted work injury.

29. Since April 3, 2008, claimant has no longer been at MMI and he has been unable to perform any work. Claimant suffered increased disability due to his worsening of condition.

30. The preponderance of the evidence demonstrates that claimant's average weekly wage should not be modified effective April 3, 2008. He was unable to return to work due to his work injury. His average weekly wage for purposes of his renewed TTD is the admitted average weekly wage.

CONCLUSIONS OF LAW

1. Respondents first argue that claimant's petition to reopen is barred by the statute of limitations in section 8-43-303(1), C.R.S. That provision allows reopening within six years from the date of injury. Contrary to respondents' argument, claimant filed a timely petition to reopen prior to the expiration of six years from his injury. That petition was never withdrawn or dismissed. The fact that the hearing did not occur until 16 months later does not change the timely status of the petition. *Federal Express v. Industrial Claim Appeals Office of the State of Colorado,* 51 P.3d 1107 (Colo.App. 2002); *Mascitelli v. Giuliano & Sons Coal Company*, 157 Colo. 240, 402 P.2d 192 (1965); *Westerman v. Manitou and Pikes Peak Railway and/or High Bridge Saloon,* W.C. Nos. 3-903-645, 4-407-473 (Industrial Claim Appeals Office, November 17, 2000). Nothing in the statute prohibits from petitioning to reopen without a statement that he is no longer at MMI. Claimant merely has to prove that he has suffered a change since the previous closure of the claim and that he is entitled to additional benefits. Claimant has satisfied those requirements.

2. Section 8-43-303(1), C.R.S. provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Claimant must prove that his change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant has proven by a preponderance of the evidence that he suffered a change of condition after MMI as a natural consequence of the work injury.

3. Claimant was unable to return to the usual job due to the effects of the work injury. Consequently, claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits con-

tinue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Upon reopening, claimant must prove increased disability since the original MMI date. *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). As found, claimant has proven by a preponderance of the evidence that he suffered increased disability since MMI.

4. Respondents argue that claimant's average weekly wage effective April 3, 2008, should be zero because he was earning no wages on that date. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage at the time of the injury. Section 8-42-102(3), C.R.S., permits the ALJ discretion in the method of calculating the average weekly wage if the nature of the employment or the fact that the injured employee has not worked a sufficient length of time, has been ill or self-employed, or for any other reason, the specific methods do not fairly compute the average weekly wage. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993) required recalculation of the average weekly wage in an occupational disease case involving a new period of TTD long after the initial onset of the disease when claimant had received significant average weekly wage increases in the meantime. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo.App. 2001) upheld application of the *Campbell* holding to allow calculation of disability benefits based upon subsequent employment at a much higher wage than the claimant earned as a pizza delivery driver. As found, claimant's zero earnings on April 3, 2008, were caused by the work injury. Consequently, respondents have failed to demonstrate that the average weekly wage should be modified.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is granted.

2. Respondents' request to modify the average weekly wage is denied and dismissed.

3. The Insurer shall pay to claimant TTD benefits at the admitted rate of $557.56 per week commencing April 3, 2008, and continuing thereafter until modified or terminated according to law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

DATED: November 20, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-563-417

ISSUES

The following issues were raised for consideration at hearing:

1. Petition to Reopen;
2. Compensability;
3. Medical benefits; and
4. Temporary disability benefits.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are entered.

1. The hearing in this matter concerned two workers' compensation claims. One admitted claim (WC 4-461-532), concerned a left knee injury occurring on February 7, 2000. This claim was closed by operation of a September 20, 2001 Final Admission of Liability. The current issue in that claim involves Claimant's Petition to Reopen for worsening of condition dated December 1, 2005. Claimant is seeking medical benefits related to the alleged worsening of condition, as well as temporary total disability benefits (TTD) benefits starting November 14, 2005 and ongoing.

2. The second claim (WC 4-563-417), concerns an alleged bilateral knee injury occurring on April 26, 2002. Claimant is seeking workers' compensation benefits, including medical benefits and TTD benefits starting November 14, 2005 and ongoing, as a result of that claim.

3. At hearing, the Claimant provided no credible testimony that his left lower extremity injury had worsened solely related to the February 7, 2000 work related injury. Following his release at maximum medical improvement (MMI) in that claim, Claimant returned to full time work with the Employer. Claimant did not file an Objection to the Final Admission of Liability in that matter, and did not seek any additional treatment until after the alleged April 26, 2002 bilateral lower extremity injury. Further, Claimant provided no credible testimony at hearing as to how his left knee condition is worse at this time, or how in any way the symptoms differ from symptoms he had at the time of his release at MMI on June 8, 2001.

4. At hearing, the Claimant testified that on April 26, 2002, his left foot slipped on a piece of vinyl, causing his entire body to move to the right. Claimant testified that he felt pain in both knees as a result of this episode. However, this version of events bears little or no resemblance to the version of the incident as described in Claimant's Workers' Claim for Compensation or what was indicated

in the medical records provided for review by the parties. The Judge finds Claimant's testimony with respect to the April 26, 2002 episode to be inconsistent and not persuasive.

5. At hearing, the Claimant testified that following the April 26, 2002 alleged incident, he continued to work full time with the Employer, standing for the greater part of his eight hour work day. No evidence was provided that Claimant missed time from work following the April 26, 2002 alleged incident. In fact, the evidence indicates that the Claimant continued to work following April 26, 2002 until he suffered a new unrelated work injury to his hand on November 12, 2002. Claimant testified at hearing that he continued to work for the Employer following that date until February, 2003, when the restrictions from his hand injury could not be accommodated. Claimant testified at hearing that he most likely would have been able to continue working for the Employer had he not suffered the November 12, 2002 hand injury.

6. Following the alleged April 26, 2002 incident, Claimant treated conservatively with Dr. Hattem at Concentra. Concentra's May 1, 2002 report indicates that the Claimant had full range of motion of both knees, and no swelling of either knee. Subsequent reports of Dr. Hattem and Concentra supported these findings. Further in his May 30, 2002 report, Dr. Hattem noted that Claimant exhibited no distress on examination, and no instability of either knee. However, he did refer the Claimant for an MRI of both knees, which showed an old tear of the ACL in the right knee, and an intact ACL repair and degenerative changes in the left knee. At hearing, Dr. Hattem testified that the scarring noted in the right knee MRI ACL tear meant that the tear was old, most likely occurring before April 26, 2002. The Judge finds the reports and hearing testimony of Dr. Hattem to be credible and persuasive.

7. In his report dated July 22, 2002, Dr Hattem noted that the Claimant advised him he was not interested in any follow up consultation with Dr. Papilion. He also notes in that report that the Claimant declined additional treatment or referral, and indicated that he was working without issue and that his knee conditions were better. As such, Dr. Hattem released the Claimant at MMI, with no impairment, determining that the Claimant had returned to his pre-April 26, 2002 medical status, with no additional restrictions. Dr. Hattem confirmed these statements in his hearing testimony. At hearing, Claimant testified that he did not seek additional treatment as he was scared from prior surgical complications and did not know who would pay for the treatment. The Judge finds the reports and hearing testimony of Dr. Hattem to be credible and persuasive and the testimony of the Claimant on this issue to be inconsistent and unpersuasive.

8. Dr. Hattem testified at hearing that he treated Claimant following his November, 2002, unrelated hand injury, through mid-2003. He stated that during that time Claimant made no complaints of symptoms in his bilateral lower extremities. Further, no documentation was presented for the time period from July,

2002, through November, 2005 indicating that Claimant sought any treatment whatsoever for his alleged bilateral lower extremity injuries. It was not until November of 2005, that Claimant saw an unauthorized physician, Dr. Diaz for symptoms in his bilateral lower extremities. At hearing, Dr. Hattem asserted that the interval of time from July 22, 2002 and the November 14, 2005 evaluation with Dr. Diaz lead him to the conclusion that Claimant's current medical condition/ symptoms could not be related to the April 26, 2002 episode. Dr. Hattem opined that Claimant's current condition is more likely than not related to degenerative changes of Claimant's bilateral lower extremity, unrelated to the April 26, 2002 incident. The Judge finds this testimony of Dr. Hattem to be persuasive and credible.

9. At hearing, Claimant presented the deposition testimony of Dr. Stephen Lindenbaum. Dr. Lindenbaum testified that he first saw Claimant in June 2007. Based on his review of the medical records, Dr. Lindenbaum opined that Claimant was not at MMI following the April 26, 2002 episode. He further stated in his testimony that Claimant's current condition and need for treatment are related to the April 26, 2002 episode. Upon review of all of the evidence presented in this matter, including the deposition of Dr. Lindenbaum, the Judge finds Dr. Lindenbaum's opinions to be inconsistent with the other evidence presented, unpersuasive and not credible.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. Section 8-42-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See, *Magnetic Engineering v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

4. Section 8-43-303(1), C.R.S. provides that an award may be reopened on the grounds of a change in condition. The question of whether the claimant has proved that the industrial injury was the cause of the worsened condition is one of fact for determination by the ALJ. *Hennerman v. Blue Mountain Energy*, W.C. No. 4-366-000 (November 8,2001), *citing Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000).

5. The Workers' Compensation Rules of Procedure, Rule X.B(2) requires on a petition to reopen based on worsening condition, a medical report describing the claimant's condition and how it has deteriorated or improved. The testimony of a claimant that his problems have increased is sufficient for an ALJ to order reopening of the case. *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983)(cert. Denied, 1983; *see also, Hennerman, supra; Brunette v. Denver Presbyterian Hospital,* W.C. No. 3-988-271 (I.C.A.O, August 4, 1994).

6. At hearing, Claimant provided no credible testimony that his left lower extremity injury had worsened solely related to the February 7, 2000 work related injury. Following his release at maximum medical improvement (MMI) in that claim, Claimant returned to full time work with the Employer. Claimant did not file an Objection to the Final Admission of Liability in that matter, and did not seek any additional treatment until after the alleged April 26, 2002 bilateral lower extremity injury. Further, Claimant provided no credible testimony at hearing as to how his left knee condition is worse at this time, or how in any way the symptoms differ from symptoms he had at the time of his release at MMI on June 8, 2001.

7. Since there was no credible or persuasive evidence that Claimant suffered a worsened condition, it concluded that the Petition to Reopen in W.C. # 4-461-532 is denied and dismissed.

8. Furthermore, Claimant failed to sustain his burden of proof that he suffered a bilateral lower extremity injury in W.C. # 4-563-417. Claimant's testimony was deemed less credible and persuasive than the testimony of Dr. Hattem. Dr. Hattem opined that Claimant's current condition is more likely than not related to degenerative changes of Claimant's bilateral lower extremity, unrelated to the April 26, 2002 incident.

9. Accordingly, it is concluded that Claimant's workers' compensation claim in W.C. # 4-563-417 is denied and dismissed.

ORDER

It is therefore ordered that:

1. The Petition to Reopen is denied and dismissed in W.C. # 4-461-532.

2. Claimant's claim for workers' compensation benefits in W.C. # 4-563-417 is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

DATED: November 20, 2008 Margot W. Jones

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-568-735

ISSUES

The sole issue determined herein is claimant's petition to reopen based upon a change of condition.

FINDINGS OF FACT

1. Claimant has an implanted spinal cord stimulator to treat chronic pain complaints resulting from a February 2001 non-work-related motor vehicle accident. Claimant received treatment for the February 2001 injuries from Dr. John Nelson. The spinal cord stimulator was implanted in August 2002.

2. On October 13, 2002, claimant suffered an admitted work injury arising out of and in the course of her employment with the employer. Claimant was scanning an entertainment center with the assistance of two customers. The customers abruptly lowered one end of the entertainment center. As a result, claimant had to quickly catch the entertainment center with her right hand, causing injury to her low back.

3. Later on October 13, 2002, claimant reported to the Memorial Hospital Emergency Room with complaints of pain in her back and between her shoulder blades. The records of Memorial Hospital note a history of chronic low back pain and an implanted spinal cord stimulator. Claimant testified that this history is incorrect because she had chronic pain, but not chronic low back pain.

4. After being treated at the Memorial Hospital, claimant was referred to Dr. John Reasoner, the employer's designated provider for work-related injuries. Dr. Reasoner first treated the claimant on October 14, 2002. Dr. Reasoner diagnosed lumbar strain. Dr. Reasoner restricted claimant's work activities and prescribed medications and physical therapy. He also ordered x-rays of the claimant's lumbar spine. The x-rays of the lumbar spine taken October 23, 2002, showed no acute abnormalities, with no fracture or dislocation. The disc heights were well maintained. The sacroiliac ("SI") joints were normal.

5. Claimant failed to improve with the treatments prescribed by Dr. Reasoner and reported worsening symptoms.

6. Dr. Reasoner obtained copies of x-rays of claimant's thoracic spine ordered by Dr. Nelson. The x-rays, taken before the October 13, 2002 work injury, showed that the lead to the claimant's spinal cord stimulator had migrated.

7. Dr. Reasoner evaluated the claimant on December 30, 2002. Claimant complained that her neck pain and back pain were very bad. Dr. Reasoner noted no significant changes and questioned whether the catheter insertion and subsequent movement contributed to claimant's ongoing pain complaints.

8. On January 15, 2003, Dr. Reasoner determined that claimant had reached maximum medical improvement ("MMI") on December 30, 2002, with zero percent permanent impairment. Dr. Reasoner suspected that claimant's continued low back pain was due to the spinal stimulator. He noted that most lumbar strains would have naturally resolved and she had no upper thoracic or cervical basis for ongoing lumbar pain.

9. At hearing, claimant testified that she disagreed with the MMI determination by Dr. Reasoner and believed that she needed additional diagnostic testing, including a magnetic resonance image ("MRI").

10. On February 6, 2003, the insurer filed a Final Admission of Liability denying permanent disability benefits and denying post-MMI medical benefits, consistent with the opinions of Dr. Reasoner.

11. On February 15, 2003, claimant returned to Dr. Reasoner, complaining that her pain had "tripled". She stated that her pain was not caused by the malfunctioning spinal cord stimulator. She complained of "severe" pain in her neck and upper back. In addition, she demonstrated minimal lumbar range of motion. Dr. Reasoner referred the claimant to Dr. Scott Ross for a second opinion.

12. On February 25, 2003, claimant again returned to Dr. Reasoner, reporting no change in her pain level and reporting that her back was in a lot of pain. Dr. Reasoner assessed chronic back pain.

13. On March 6, 2003, Dr. Ross examined claimant and opined that he had no evidence of thoracic or lumbar radiculopathy. He noted that claimant had diffuse tenderness to palpation that was much greater than expected with very superficial palpation. She also had multiple Waddell's signs, raising concerns about some non-organic pathology. Dr. Ross did not recommend any further intervention for claimant's superficial back pain.

14. On March 10, 2003, Dr. Reasoner discharged claimant from his care and released her to return to the restrictions set by Dr. John Nelson "due to chronic pain syndrome."

15. Claimant timely objected to the February 6, 2003 Final Admission of Liability and requested a Division Independent Medical Examination ("DIME").

16. On April 24, 2003, Dr. Hall performed an independent medical examination ("IME") for claimant. Dr. Hall diagnosed soft tissue injury to the cervicothoracic area, probable myogenic thoracic outlet syndrome on the left, possible left upper extremity radiculopathy, myofascial injury to the thoracolumbar area, and musculoskeletal headache. He recommended additional diagnostic testing and then treatment for the cervicothoracic and upper extremity symptoms. Dr. Hall also was of the opinion that the malfunctioning of the spinal stimulator was due to the admitted work injury. He recommended removing the stimulator, obtaining an MRI of the cervical spine, and then reimplanting the stimulator.

17. On June 2, 2003, Dr. Morgan performed the DIME. On physical exam, Dr. Morgan noted that the range of motion of claimant's cervical spine was diminished by at least 50 percent in all ranges due to pain complaints. Range of motion of the lumbar spine could not be tested due to pain complaints. Thoracic outlet provocation maneuvers could not really be tested due to complaints of pain. Four out of five Waddell's signs were consistently positive. Based on his review of the records and physical examination, Dr. Morgan agreed with the authorized treating physician's opinions on MMI and impairment. Dr. Morgan concluded that claimant demonstrated too many inconsistencies about her history and too many nonphysiologic findings on her serial physical exams to suggest that there was any true organic pathology as a result of the work injury. He concluded that the stimulator was unrelated to the work injury and that claimant suffered no neck or upper extremity injury in the industrial accident.

18. On July 17, 2003, the insurer filed a Final Admission of Liability denying permanent disability benefits and post-MMI medical benefits, consistent with the determinations of the DIME.

19. Claimant applied for a hearing, endorsing the issue of overcoming the DIME. Dr. Hall wrote a letter disagreeing with the conclusions of Dr. Morgan. Claimant later withdrew her application for hearing and the claim was closed.

20. Dr. Nelson continued treating claimant for chronic pain until he ceased his practice in approximately April 2007. On February 15, 2006, Dr. Nelson recommended revising the spinal stimulator to make it functional again. A January 24, 2007, computerized tomography ("CT") showed mild bulges at L3-4, L4-5, and L5-S1. Claimant requested a leave of absence from work to have the surgery to revise the stimulator, but she canceled the surgery due to the cost.

21. On August 1, 2007, Dr. Giancarlo Barolat evaluated claimant. Dr. Barolat diagnosed chronic regional pain syndrome ("CRPS") of the left foot, which was improving, as well as severe low back pain. He found the CT scan to be unremarkable for any pathology. Dr. Barolat recommended a MRI, but noted that the stimulator had to be removed before the MRI could proceed. Dr. Barolat was skeptical that any surgery would be reasonable to treat claimant.

22. On December 11, 2007, Dr. Barolat reexamined claimant and referred her to Dr. Goldman.

23. On July 10, 2008, Dr. Fall performed an IME for respondents. On range of motion testing, Dr. Fall noted that claimant flexed forward to five degrees and indicated an inability to flex any further due to pain. With extension, claimant achieved less than five degrees with complaints of worsening pain. Claimant complained of pain extending from L1 through the sacrum. On physical exam, Dr. Fall noted no paraspinal trigger points or spasming. There was no lateral shift. She concluded that the work injury had not caused the spinal electrode migration and that claimant suffered only a self-limiting strain of the thoracic-lumbar area. She agreed that the CT was unremarkable. She agreed that claimant was at MMI without any permanent impairment. Dr. Fall found no objective evidence of a lumbosacral condition or of any worsening of claimant's condition.

24. Dr. Barolat testified by deposition on July 22, 2008. Dr. Barolat testified he did not have complete copies of claimant's medical records. Dr. Barolat agreed that claimant had no objective findings consistent with her complaints of severe intractable back pain. Dr. Barolat was unaware of the claimant's psychiatric history. Dr. Barolat testified he could not state whether the claimant's condition now is any different or worse than it was when she was placed at MMI on December 30, 2002. Dr. Barolat testified that the recommended MRI was a diagnostic tool. Dr. Barolat has not recommended any treatment specifically designed to improve claimant's condition. He agreed that the CT scan was unremarkable, but disc degeneration would not show on a CT scan unless the disc was herniated. He recommended the MRI because claimant's pain had persisted for several years and the MRI would provide a "full evaluation."

25. Dr. Fall testified at hearing that claimant's condition had not worsened since she was placed at MMI on December 30, 2002. Dr. Fall noted that claimant's current range of motion is consistent with the measurements at the June 2, 2003 DIME. Dr. Fall further noted that the medical records do not document significant findings regarding claimant's lumbar spine. Dr. Fall agreed with the treating physician and DIME opinions

that claimant sustained a self-limited muscular strain of the thoracolumbar area without residuals and was appropriately placed at MMI with no impairment on December 30, 2002. Dr. Fall noted that the CT scan of the lumbar spine was unremarkable and additional diagnostic testing probably would not show any additional work-related findings. She would recommend the MRI for claimant only to rule out any spinal tumor or other pathology unrelated to the work injury.

26. Claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition as a natural consequence of her admitted industrial injury. At MMI, she had high levels of pain complaints. She still has high levels of pain complaints. She is currently able to maintain full time employment. At MMI, claimant complained of pain so severe that it interfered with her sleep, affected her vocational activities, and affected her avocational activities. These complaints are consistent with claimant's current complaints. Claimant's testimony that her medical condition has worsened is not credible. Claimant's testimony is inconsistent with her prior statements and is not supported by the medical records or the testimony of either Dr. Barolat or Dr. Fall. The record evidence demonstrates that physicians recommend a MRI and that surgery to remove the implanted spinal stimulator is necessary before claimant can receive the MRI. The record evidence does not, however, demonstrate that claimant's condition has changed since MMI. Even Dr. Barolat admitted that he could not say that claimant is worse than at MMI.

CONCLUSIONS OF LAW

1. Claimant seeks to reopen the claim based upon a change of condition since MMI. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Claimant must prove that her change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition as a natural consequence of her admitted industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

DATED: November 7, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-574-504

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that she is entitled to the imposition of penalties against the respondent insurer for the filing of improper admissions of liability?

¬ Did the respondents prove by a preponderance of the evidence that the claims for penalties are barred by the statute of limitations found at § 8-43-304(5)?

¬ Did the final admissions of liability filed by the respondents serve to close some or all of the claims for benefits addressed in this order, including claims for penalties?

¬ Are the respondents entitled to an award of attorney fees because the claimant's counsel filed an application for hearing concerning issues that were not "ripe" for hearing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The claimant suffered compensable workplace injuries on February 18, 2002, March 8, 2002, and April 10, 2002. The claims for these injuries were assigned W.C. No. 4-574-504, W.C. No. 4-546-112, and W.C. No. 4-539-048, respectively. The February 2002 injury resulted from a slip and fall, and the other two injuries resulted from motor vehicle accidents (MVA).

2. Dr. Bruce Lockwood, M.D., treated the claimant for these injuries. Dr. Lockwood first examined the claimant on May 24, 2002. The claimant gave Dr. Lockwood a history that the February injury affected her right shoulder. The claimant further stated that after the March 8, 2002, MVA, she experienced worsened right shoulder pain and the onset of neck pain. Following the April 10, 2002, MVA, the claimant reported that she had the onset of low back pain, lower thoracic pain, shoulder pain, and that all prior conditions became worse. Dr. Lockwood opined the claimant's examination was "most consistent with soft tissue injuries with psychologic overlay." Dr. Lockwood recommended medications and physical therapy.

3. The claimant returned to Dr. Lockwood on July 23, 2002. The claimant reported she had improved with physical therapy, but her symptoms recurred after she returned to work for the employer. The claimant advised Dr. Lockwood that she did not like going back to work and that she did not like the people there. The claimant advised Dr. Lockwood that she did not wish to undergo invasive therapies. Dr. Lockwood opined the claimant was likely at maximum medical improvement (MMI) and recommended a Functional Capacities Evaluation (FCE).

4. On August 30, 2002, Dr. Lockwood again examined the claimant. She reported all of her pain had resolved except for neck "achiness and stiffness" and right shoulder pain. Dr. Lockwood opined that based on the available information it "would appear as

though she has been appropriately placed at" MMI. Dr. Lockwood assigned 6 percent whole person impairment for the cervical spine and 2 percent whole person impairment for right shoulder range of motion deficits. Dr. Lockwood stated that with the "the information available to me it does not appear as though apportionment is appropriate." However, he stated that "if need be" he would "apportion 50% to each motor vehicle accident."

5. On September 10, 2002, the insurer filed a General Admission of Liability (GAL) with respect to the injury sustained on March 8, 2002 (W.C. No. 4-546-112). The GAL admitted for medical benefits only with no lost time.

6. On April 11, 2003, the insurer filed a Final Admission of Liability (FAL), with respect to the February 18, 2002, injury (W.C. No. 4-574-504). The FAL admitted for permanent partial disability (PPD) benefits in the amount of $5,530.03 based on a 4 percent whole person impairment rating. The FAL was accompanied by Dr. Lockwood's August 30, 2002, report.

7. On April 22, 2003, the insurer mailed to the claimant and the Division of Workers' Compensation an FAL with respect to the April 10, 2002, injury (W.C. No. 4-539-048). This FAL admitted for PPD benefits in the amount of $5,530.03 based on a 4 percent whole person impairment rating. The FAL further admitted liability for temporary total disability (TTD) benefits in the amount of $4297.48 for the time period April 11, 2002, through August 29, 2002. This FAL was accompanied by Dr. Lockwood's August 30, 2002, report.

8. The April 22, 2003, FAL contains a "Notice To Claimant" stating that the FAL is the "final admission" in the case, and advising the claimant that if she disagrees "with the amount or type of benefits which the carrier or self-insured has agreed to pay, WITHIN 30 DAYS OF THIS FINAL ADMISSION," she must object to the FAL in writing, file an application for hearing with respect to disputed issues, and request a Division Independent Medical Examination if disputing the date of MMI or the impairment rating. In the section of the FAL marked "Benefit History," the insurer specifically lists the amounts and periods of TTD and PPD benefits admitted. The Benefit History section also contains lines to insert the "amount of interest" and "amount of penalties" paid. On the April 22, 2003, FAL the interest and penalties lines are blank (not filled in with a dollar amount). However, in a line immediately beneath the interest and penalties lines, there is a line for "amount overpaid." In the "amount overpaid" line the insurer has inserted $839.69. In the remarks section of the FAL the insurer has inserted the words "TAKING CREDIT FOR OVERPAYMENT OF TTD AFTER DATED [sic] OF MMI" and "ALL BENEFITS NOT SPECIFICALLY ADMITTED SHOULD BE CONSIDERED TO BE DENIED." (Emphasis in original).

9. The parties stipulated concerning the claimant's expected testimony. The parties stipulated that the claimant would testify she was not represented by counsel at the time the insurer filed the GAL and the two final admissions. The parties further stipulated the claimant would testify that she is not educated or trained in the law, and that, apart from the contents of the admissions themselves, she had no knowledge of what to do, if anything, concerning the admissions.

10. The parties further stipulated that on December 17, 2003, Mr. Blundell entered his appearance as counsel for the claimant in all three claims.

11. On April 26, 2004, Mr. Blundell mailed an Application For Hearing, with respect to the February 18, 2002, injury (W.C. No. 4-574-504). The application listed the issue of penalties against the respondents for "filing and relying on invalid, improper and belatedly filed Final Admission per 8-43-203(2)(b)(II), and Rule IV of W.C.R.P." The application also lists "failing to admit" TTD benefits, average weekly wage and falsely stating the MMI date, and that the date of injury was "inconsistent with authorized medical reports." The record does not indicate that any hearing was ever held with respect to this application for hearing.

12. On April 26, 2004, Mr. Blundell mailed an Application For Hearing, with respect to the April 10, 2002, injury (W.C. No. 4-539-048). The application listed the issue of penalties against the respondents for: (1) Failing to file and rely on final admission based on MMI report and rating per 8-43-203(2)(b)(II), 8-42-107(8)(b)(c), 8-42-107.2, 8-421-105 [sic], 8-43-304, and Rule IV of W.C.R.P; (2) To report per 8-43-301 and Rule IV; (3) Failure to admit or deny per 8-43-203 and Rule IV.

13. On April 26, 2004, Mr. Blundell mailed an Application For Hearing, with respect to the March 8, 2002, injury (W.C. No. 4-546-112). The application listed the issue of penalties against the respondents for: (1) Failing to file and rely on final admission based on MMI report and rating per 8-43-203(2)(b)(II), 8-42-107(8)(b)(c), 8-42-107.2, 8-421-105 [sic], 8-43-304, and Rule IV of W.C.R.P.; (2) To report per 8-43-301 and Rule IV; (3) Failure to admit or deny per 8-43-203 and Rule IV; (4) Failure to admit an average weekly wage; (5) Medical benefits "falsely stated"; (6) MMI date "falsely stated"; (7) GAL filed late; (8) GAL falsely states it was mailed to claimant's attorney; (9) Failure to file an FAL and admit for PPD, average weekly wage and medical benefits.

14. For reasons that are not clear in the record, no hearings were held on these applications for hearing.

15. On September 16, 2004, Mr. Blundell again mailed applications for hearing seeking penalties in each of the three claims. The grounds for seeking penalties were essentially the same as the grounds cited in the April 2004 applications for hearing. However, in October 2004 the September 2004 applications for hearing were dismissed because claimant's counsel failed to consult with respondents' counsel prior to filing the applications.

16. On June 11, 2008, counsel for claimant, Mr. Sanders, again mailed applications for hearing in each of the three claims. These applications seek the imposition of penalties and are virtually identical to the applications for hearing filed on September 16, 2004.

17. The requests for penalties in all three claims were consolidated for hearing.

18. The respondents proved it is more probably true than not that requests for penalties with respect to the FAL filed on April 11, 2003, in W.C. No. 4-574-504 (February 18, 2002 date of injury), are barred by the statute of limitations contained in § 8-43-304(5), C.R.S. The vast majority of the requests for penalties involve assertions that the FAL was defective on its face because it was incomplete, inaccurate, and inconsistent with factual assertions contained in Dr. Lockwood's report of August 30, 2002. The FAL does in fact contain an alleged date of injury, an alleged date of MMI, and admits for PPD benefits. The ALJ finds that the alleged defects with respect to the date of injury, the date of MMI and the amount of benefits admitted could have been detected by a reasonable person had they immediately examined the FAL and Dr. Lockwood's ac-

companying report. Moreover, the facts giving rise to any inference that the insurer illegally delayed in filing the FAL should have been apparent to a reasonable person by examining the date Dr. Lockwood's report and the date the FAL was mailed. Specifically, the FAL and report were sent to the claimant on April 11, 2003, and there is no credible or persuasive evidence, that she did not receive the FAL and report in a timely fashion. However, no request for penalties with respect to this FAL was ever filed until April 26, 2004, more than one year after the claimant reasonably should have known of the facts giving rise to the alleged penalty claims.

19. The respondents failed to prove it is more probably true than not that requests for penalties with respect to the FAL filed on April 22, 2003, in W.C. No. 4-539-048 (April 10, 2002, date of injury) are barred by the statute of limitations contained in § 8-43-304(5). The evidence does not establish the date on which the claimant received the FAL that the respondents filed on April 22, 2003. Allowing three days for mailing and delivery of the FAL to the claimant, a period of time that the ALJ determines to be reasonable, the ALJ infers the claimant received the FAL no later than April 25, 2003. The ALJ takes administrative notice that April 25, 2003, was a Friday. Thus, by Friday, April 25, 2003, the claimant knew or reasonably should have known of the defects in the April 22, 2003, FAL, that give rise to the claims for penalties. The application for hearing requesting penalties was filed on April 26, 2004. The ALJ takes administrative notice that April 26, 2004, was a Monday. Thus, the ALJ finds the request for penalties was filed within one year of the date the claimant knew, or reasonably should have known of the alleged defects in the FAL mailed on April 22, 2003.

20. Nevertheless, the ALJ finds the issue of penalties was closed because the claimant failed to object to and request a hearing on that issue within 30 days of the April 22, 2003, FAL. The ALJ finds it is implicit in the April 22, 2003, FAL that the insurer denied liability for interest and penalties. If the insurer had intended to admit for any liability or penalties it would have completed the appropriate lines in the Benefit History section of the FAL. In that event, the claimed overpayment of $839.69 would have been reduced or eliminated. However, because the lines for penalties and interest were left blank, because the insurer did not reduce the claimed overpayment, and because the insurer expressly stated that benefits not admitted were denied, the insurer implicitly denied any liability for penalties. The claimant did not file a request for penalties until April 26, 2004, long after the 30 day limit to object to the FAL and request penalties had lapsed.

21. The respondents proved it is more probably true than not that requests for penalties with respect to the GAL filed on September 10, 2002, in W.C. No. 4-546-112 (March 8, 2002, date of injury) are barred by the statute of limitations contained in § 8-43-304(5). The vast majority of the requests for penalties involve assertions that the GAL was defective on its face because it was incomplete, inaccurate, and inconsistent with factual assertions contained in Dr. Lockwood's report of August 30, 2002. The claimant's position statement also notes an alleged violation of former WCRP IV (N)(2), which requires a "medical benefits only" GAL to "include remarks outlining the basis for denial of temporary and permanent disability benefits." Finally, the claimant alleges the insurer improperly failed to file an FAL admitting for benefits with respect to the injury of March 8, 2002.

22. The facts giving rise to any claim that the insurer acted illegally by improperly filing the GAL should have been known to a reasonable person no later than April 11,

2003. By April 11, 2003, the claimant had already received the September 2002 GAL, as well as the April 11, 2003, FAL. Thus, the fact that the GAL lacked any explanation concerning the failure to admit for temporary and permanent disability benefits should have been apparent in September 2002. The same is true with respect to any other facial errors in the GAL. Insofar as the GAL could be considered inconsistent with Dr. Lockwood's report of August 30, 2002, the facts surrounding such inconsistencies should have been apparent to the claimant by April 11, 2003, when she received Dr. Lockwood's report in connection with the FAL filed on that date. However, the claimant did not request any penalties with respect to the March 8, 2002, injury, until she filed the application for hearing April 26, 2004, more than a year after April 11, 2003, FAL was filed and two years after the GAL was filed.

23. Insofar as the claimant is asserting that the respondents should have filed an FAL with respect to the injury of March 8, 2002, the claimant, as a reasonable person, should have known the facts and circumstances surrounding this alleged legal duty by April 11, 2003. Dr. Lockwood's report, attached to the April 11, 2003, FAL, indicates that he was fully aware of all three injuries sustained by the claimant, and contains the opinion that the claimant was "appropriately placed at maximum medical improvement." Further, Dr. Lockwood assigns an 8 percent whole person impairment rating and suggests the possibility of apportionment between "each motor vehicle accident." Thus, by April 11, 2003, the claimant should have been aware that Dr. Lockwood had placed her at MMI fort the March 8 injury, and the possibility that he had assigned a permanent impairment rating for the March 8 injury. However, the claimant did not request any penalties for failure to file an FAL with respect to the March 8, 2002, injury, until she filed the application for hearing on April 26, 2004, more than a year after the April 11, 2003, FAL was filed.

24. Although the ALJ accepts as true the claimant's proffered testimony that she is not educated in the law, and that she did not know what to do about the admissions other than what was stated in them, the ALJ finds these facts do not alter the outcome of the case. The claimant is presumed to know the law, and to the extent she was ignorant of the law such ignorance does not alter her knowledge with respect *facts* relevant to application of the statute of limitations.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

STATUTE OF LIMITATIONS DEFENSE TO PENALTY CLAIMS

a. At hearing, the claimant raised numerous requests for penalties with respect to the admissions filed in each of the three claims. The claimant seeks the imposition of these penalties under § 8-43-304(1), C.R.S. The respondents contend that each claim for penalties is barred by the statute of limitations contained in § 8-43-304(5), C.R.S. The ALJ partially agrees with the respondents.

b. Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $500 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or

does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

c. Section 8-43-304(5) provides that a "request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." Section 8-43-305, C.R.S., provides that each day an insurer "fails to comply with any lawful order" of the director constitutes a "separate and distinct violation thereof." Section 8-43-305 further provides that in an action to enforce a penalty "such violation shall be considered cumulative and may be joined in such action."

d. In *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002), the claimant observed that § 8-43-305 provides that each day an insurer disobeys an order constitutes a "separate violation" of the order. Therefore the claimant reasoned that failure to file an application seeking a penalty within one year of first learning the facts giving rise to the penalty was not fatal to the entire penalty claim. Rather, the claimant reasoned that § 8-43-304(5) acts as a "cap" on the amount of recovery and bars only those penalty claims based on violations that occurred more than one year before the application for hearing was filed.

e. However the *Spracklin* court rejected the claimant's analysis of these statutes. The court reasoned that § 8-43-304(5) is a statue of limitations designed to "ensure prompt litigation of penalty claims once the underlying violation is first discovered." Thus, the statute plainly "requires a request for penalties to be filed within one year after the requesting party *first became aware of the circumstances* that constitute a violation and support the imposition of a penalty, even if that violation was ongoing." (Emphasis added).

f. Significantly, the statute of limitations in § 8-43-304(5) is triggered by knowledge or constructive knowledge of "facts" giving rise to a "possible" claim for penalties. Conversely, parties to workers' compensation cases are presumed to know the *law*, even if they are pro se. *See Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821 (Colo. App. 2001). Hence, it is no defense to application of the statute of limitations that a pro se claimant was ignorant of the applicable statutes and rules of procedure, or that they were pro se when the possible claim for penalties arose. *See Ray v. New World Van Lines,* W.C. No. 4-520-251 (ICAO, October 12, 2004), *reversed on other issues*, *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006).

g. The claimant seeks penalties with respect to the FAL filed on April 11, 2003, for the injury of February 18, 2002, (W.C. No. 4-574-504). The claimant alleges the FAL

violates the Act and/or applicable rules of procedure because it "utterly fails to address either the date of injury, any date of MMI, and permanent impairment." The claimant further alleges inconsistencies between Dr. Lockwood's August 30, 2002, MMI report and rating and the contents of the FAL. Finally, the claimant alleges the FAL was not properly completed as required by former WCRP XI (A), and was not timely filed.

h. The ALJ concludes that all requests for § 8-43-304(4) penalties with respect to the April 11, 2003, FAL, (W.C. No. 4-574-504, February 18, 2002 date of injury) are barred by the statute of limitations contained in 8-43-304(5). As determined in Finding of Fact 18, the FAL was mailed to the claimant on April 11, 2003, and there is no credible and persuasive evidence that she did not receive it in a timely fashion. Upon receipt of the final admission, a reasonable person would have recognized all of the facts necessary to request any of the penalties now alleged by the claimant. Nevertheless, the claimant did not file a request for penalties until April 26, 2004, more than one year after the deadline prescribed by § 8-43-304(5). Thus, the requests for penalties are barred by § 8-43-304(5).

i. The claimant seeks penalties with respect to the FAL filed on April 22, 2003, for the injury of April 10, 2002 (W.C. No. 4-539-048). The claimant alleges virtually all of the same defects as she did with respect to the FAL filed on April 11, 2003. The claimant further alleges that the April 22, 2003, FAL, did not include an objection form and a Notice and Proposal to select at DIME as required by former WCRP IV (N)(1), and that temporary benefits were improperly terminated in violation of former WCRP IX (C)(1)(a).

j. The ALJ concludes that all requests for § 8-43-304(1) penalties with respect to the April 22, 2003, FAL, (W.C. No. 4-539-048, April 10, 2002, date of injury) are not barred by the statute of limitations contained in § 8-43-304(5). In this regard, the ALJ notes that unless a statute specifies otherwise, "notice" is not generally considered to be effective until it is received. *See School District RE-11J v. Norwood,* 644 P.2d 13 (Colo. 1982). The reference to the word "year" in § 8-43-304(5), means a "calendar year." Section 2-4-107, C.R.S. When a statute requires the computation of a period of days, the first day is excluded and the last day is included. Section 2-4-108 (1), C.R.S. Further, if the "last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday." Section 2-4-108(2), C.R.S. Under former WCRP VIII (F), which was in effect when the April 2004 applications for hearing were filed, the date of filing a document with the Division of Administrative Hearings (currently OAC) is "the date the document is delivered, or the date of the certificate of mailing when the document is mailed." Compare OACRP 4(B).

k. As determined in Finding of Fact 18, the respondents' April 22, 2003, FAL was served by mail. As determined in Finding of Fact 19, the evidence does not establish the actual date that the claimant *received* the FAL, but the ALJ infers the claimant received it by Friday, April 25, 2003, three days after it was mailed. Therefore, the claimant knew, or reasonably should have known, of the alleged defects in the April 22, 2003, FAL by Friday, April 25, 2003. Because the application for hearing concerning penalties was, by rule, effectively filed on Monday, April 26, 2004, the request for penalties was made within in one year as required by § 8-43-304(5). This is true because April 25, 2003, did not count as the first day for purposes of the one-year statute of limitations, and because April 26, 2004, fell on Monday, the first business day after a Sunday. Sec-

tion 2-4-108(1) & (2). *See People v. Brunner,* 87 P.3d 267 (Colo. App. 2004); *Golden Aluminum Co. v. Weld County Board of County Commissioners,* 867 P.2d 190 (Colo. App. 1993).

l. The claimant seeks penalties with respect to the GAL filed on September 10, 2002, for the injury of March 8, 2002 (W.C. No. 4-546-112). The ALJ concludes it is more probably true than not that requests for penalties with respect to the GAL filed on September 10, 2002, in W.C. No. 4-546-112 (March 8, 2002, date of injury) are barred by the statute of limitations contained in 8-43-304(5). As determined in Finding of Fact 21, any facial errors in the GAL should have been apparent to the claimant, as a reasonable person, when she received the FAL in September 2002. Further, any alleged error resulting from inconsistency with Dr. Lockwood's report should have been apparent to the claimant as a reasonable person not later than April 11, 2003, when she received the FAL containing Dr. Lockwood's report. Similarly, as determined in Finding of Fact 23, any obligation on the part of the respondents to file an FAL with respect to the March 8, 2002, injury, should have been apparent to the claimant when she received Dr. Lockwood's report on or about April 11, 2003. Nevertheless, no request for penalties was filed until April 26, 2004.

m. Although the claimant asserts the statute of limitations defense was waived because it was not properly pled, the ALJ concludes this assertion is incorrect. The respondents' Response to Application for Hearing specifically raises the statute of limitations. The response states under the heading of other issues: "Bar to claim for penalties under § 8-43-304(5)."

n. The claimant's reliance on the cure provisions of § 8-43-304(4), C.R.S., is misplaced. The claimant's assertions notwithstanding, the cure provision is not inconsistent with and does not affect the application of the statute of limitations contained in § 8-43-304(5). Rather, the cure provision affects the burden of proof to be applied in cases where a party rectifies an alleged violation within twenty days after being notified of it by the filing of an application for hearing seeking penalties. *Ficco v. Owens Brothers Concrete Co.,* W.C. No. 4-546-848 (ICAO, May 30, 2007). In contrast, the statute of limitations concerns the amount of time a party has to "request" penalties after actually or constructively learning of the facts triggering the alleged violation.

2. CLOSURE OF PENALTY ISSUES BY APRIL 22, 2003 FAL

a. The ALJ has determined that the claims for penalties in W.C. No. 4-539-048 are not barred by the statute of limitations. Thus, the ALJ must next consider whether the claims for such penalties were closed because the claimant failed to object to the April 22, 2003, FAL, and request a hearing on penalties within 30 days of the filing of the FAL. The ALJ concludes claims for these penalties were are closed.

b. Section 8-43-203(2)(b)(II), C.R.S., provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing." Section 8-43-203(2)(d), C.R.S., provides that once a case is closed under subsection (2) "the issues closed may only be reopened pursuant to section 8-43-303." These provisions are part of a "statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injure worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Feeley v. Industrial Claim*

Appeals Office, __P.3d__ (Colo. App. No. 07CA1389, September 4, 2008); *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821, 822 (Colo. App. 2001). Thus, once an issue is closed by an FAL, it may not be the subject of further litigation unless the issue is reopened. *Feeley v. Industrial Claim Appeals Office, supra.*

c. If an FAL simply fails to address an issue that issue is not closed by the claimant's failure to object to the FAL and request a hearing on the issue. *Dalco Industries v. Garcia,* 867 P.2d 156 Colo. App. 1993). This is true because an FAL that fails to address some issue or benefit does not adequately apprise the claimant of the effect of the admission on her rights with respect to the admission. See *Leewaye v. Industrial Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007) (one purpose of § 8-43-203(2)(b)(II) is to ensure timely and accurate notice to claimants concerning their rights and obligations with respect to contesting an FAL). However, the term "issues admitted" is not limited to "issues" concerning which the employer agrees to pay benefits. Rather, that language also refers to issues "on which the employer affirmatively takes a position, either by agreeing to pay benefits or by denying liability to pay benefits." Further, a "denial" of liability need not be explicit and may be implied from the particular contents of the admission. *Dyrkopp v. Industrial Claim Appeals Office, supra* (denial of permanent total disability benefits implied by admission for PPD benefits since both benefits cover permanent wage loss).

d. As determined in Finding of Fact 20, the ALJ concludes the issue of penalties was closed by the claimant's failure timely to object and to request a hearing with respect to the FAL filed on April 22, 2003. First, the April 22, 2003, FAL advised the claimant, in accordance with the requirements of § 8-43-203(2)(b)(II), that the FAL was the "final admission" in the case, and that if the claimant disagreed "with the amount or type of benefits which the carrier or self-insured has agreed to pay, WITHIN 30 DAYS OF THEIS FINAL ADMISSION, she was required to object to the FAL, file an application for hearing concerning disputed issues, and request Division Independent Medical Examination if desired. Further, in the "Benefit History" section of the FAL, there are specific lines for the "amount of interest" and "amount of penalties" paid. These spaces were left blank, and beneath them the insurer claimed an "amount overpaid" of $839.69. In the remarks section of the FAL the insurer explained that the overpayment was based on temporary total disability benefits paid after MMI, and emphasized that benefits not specifically admitted were denied. The ALJ concludes that it is implicit in the April 22, 2003, FAL that the insurer denied liability for interest and penalties. If the insurer had intended to admit for any liability or penalties it would have completed the appropriate lines in the Benefit History section of the FAL. In that event, the claimed overpayment of $839.69 would have been reduced or eliminated. However, because the lines for penalties and interest were left blank, because the insurer did not reduce or eliminate the claimed overpayment, and because the insurer expressly stated that benefits not admitted were denied, the insurer implicitly denied any liability for penalties. Because the claimant failed to object to the FAL and request a hearing on the issue of penalties, the April 22, 2003, FAL closed the issue.

e. In reaching this conclusion, the ALJ does not deny that for some purposes the Act creates distinctions between "benefits" and "penalties." However, since the FAL itself includes the issues of "penalties" and "benefits" within the rubric of "Benefit History," and because the FAL itself indicates that any alleged "overpayment" is to include a cal-

culation of amounts admitted for interest and penalties, the ALJ concludes that for purposes of the April 22, 2003, FAL penalties are the equivalent of benefits.

3. RESPONDENTS' REQUEST FOR ATTORNEY FEES

a. The respondents seek attorney fees on the ground that some of the requests for penalties were not "ripe." The ALJ concludes that attorney fees are not warranted.

b. Section 8-43-211(2)(d), C.R.S., provides that if any person "requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees" incurred in preparing for such hearing or setting.

c. Generally, the term "ripeness" refers to whether an issue is real, immediate and fit for adjudication. Under the doctrine of ripeness, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury that may never occur. Further, a court should consider whether there is any legal impediment to adjudication of the issue. *See Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006).

d. The ALJ concludes that the claims for penalties asserted by the claimant were "ripe" within the meaning of § 8-43-211(2)(d). While the claimant delayed in filing the requests for penalties, and the ALJ has applied the statute of limitations to bar some of the claims, that does not mean the claims were not legally "ripe." The claims were indeed ripe in the sense that there was no legal impediment to their adjudication, nor was any right to penalties inchoate or contingent on uncertain events in the future. While the ALJ has determined the claimant's penalty claims are not meritorious, that does not mean they are not ripe.

e. The ALJ has considered the respondents' argument that some of the claims for penalties are not "ripe" because they are not "real" issues. For instance, the respondent asserts that the failure to admit an average weekly wage in the GAL is not a "real" issue because the GAL was for medical benefits only. The ALJ is not persuaded by the respondents' argument with respect to these penalty claims.

f. When speaking of a "real" issue in the context of ripeness, the issue must be one that it is of immediate consequence and its significance is not dependent on the occurrence of future circumstances. *See Olivas-Soto v. Industrial Claim Appeals Office, supra*. The respondents propose to use the term "real" to connote a penalty claim that is groundless or frivolous in the sense that it is not based on genuine facts or a rational interpretation of the law However, § 8-43-211(2)(d) does not permit the imposition of attorney fees based on the assertion of groundless and frivolous claims, and the ALJ declines to read the statute in that way. Indeed, the ALJ notes that, at one time, the General Assembly authorized the imposition of attorney fees if an ALJ determined that any claim was brought or defended "without substantial justification." However, the statute that authorized such awards was effectively repealed on March 1, 1996. 1991 Colo. Sess. Laws, ch. 219 at 1321; former § 8-43-216, C.R.S. Moreover, the General Assembly continues to permit the imposition of attorney fees against a party that files a frivolous petition to review or brief in support thereof. Section 8-43-301(14), C.R.S.

4. CLAIMANT'S REQUEST TO DETERMINE THE EFFECT OF FINAL ADMISSIONS

a. The claimant requests the ALJ to determine whether either of the final admissions filed by the respondents effectively closed the claims so as to prohibit the claimant from procuring additional benefits without filing a petition to reopen. With the exception

expressly noted above concerning the FAL filed on April 22, 2003, the ALJ declines to rule upon this issue and reserves it for future determination.

b. Section 8-43-207(1)(h) & (j), C.R.S., grants the ALJ authority to control the course of the proceedings and, "for good cause shown" adjourn any hearing to a later date for the taking of additional evidence.

c. Here, the claimant has not requested the ALJ to award any specific benefits except for the penalties discussed above. In these circumstances, the ALJ concludes it is premature to address the effectiveness of the final admissions with respect to closure of the claims or any particular benefits. Indeed, any order the ALJ might issue concerning whether or not the claims remain open would not be subject to review since it would neither award or deny any benefits or penalties. Section 8-43-301(2), C.R.S.; *Natkin & Co. v. Eubanks,* 775 P.2d 88 (Colo. App. 1989). Moreover, the determination of whether a claim for particular benefits was closed by either of the final admissions could conceivably depend on the particular benefit that was sought. See § 8-43-203(2)(d), C.R.S. ("issues" closed by FAL must be reopened); *Dalco Industries, Inc. v. Garcia*, *supra*.

d. For these reasons the claimant's arguments concerning whether or not the final admissions closed any of the claims are reserved for future determination and may be considered in connection with any future application for hearing requesting specific benefits under any of the claims.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. All of the claimant's requests for penalties are denied and dismissed.

2. The respondents' request for the imposition of attorney fees is denied and dismissed.

3. All issues not addressed by this order, including the effect of the final admissions with respect to closure of the claims, are reserved for future determination.

DATED: November 17, 2008

David P. Cain

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-628-850

ISSUES

The issues determined herein are authorized medical benefits and claimant's request for a change of physician.

FINDINGS OF FACT

1. On September 27, 2004, claimant suffered an admitted work injury to her low back.
2. Dr. Reasoner, at Emergicare, was the authorized treating physician ("ATP").
3. On April 25, 2005, Dr. Reasoner determined that claimant was at maximum medical improvement ("MMI"). Dr. Reasoner determined that claimant suffered 19% permanent impairment. He recommended post-MMI medical treatment with medications and physician re-checks for two years.
4. On May 31, 2005, the insurer filed a final admission of liability for permanent disability benefits and for post-MMI medical benefits.
5. Dr. Reasoner continued to treat claimant after MMI until he left the Emergicare office.
6. On April 1, 2008, claimant's attorney wrote to respondents' attorney to indicate that Dr. Reasoner was no longer in practice and no new ATP had been designated. Claimant stated that, unless a new ATP was immediately designated, she would have no alternative but to seek treatment with Dr. Timothy Hall.
7. On April 4, 2008, respondents' attorney responded to the April 1 letter by denying the request to change to Dr. Hall and authorizing claimant to choose any physician at Emergicare Clinic.
8. Claimant contacted Emergicare and obtained an appointment with Dr. Maisel for April 24, 2008.
9. On April 24, 2008, Dr. Maisel examined claimant and referred her for a magnetic resonance image ("MRI").
10. On April 29, 2008, claimant's attorney wrote to respondents' attorney to indicate that the physicians at Emergicare refused to see claimant or to offer any treatment. Claimant stated that she had selected Dr. Jeffrey Jenks as her new physician.
11. On May 3, 2008, claimant underwent the MRI referred by Dr. Maisel. The MRI showed marked improvement in the diskogenic disease at L4-5 with retraction of the protruding disk compared to the October 29, 2004, scan.
12. On May 27, 2008, Dr. Maisel examined claimant and discussed the MRI results. He informed claimant that she was "better."
13. Claimant became "uncomfortable" with Dr. Maisel after he told her that she was "better."
14. On July 11, the adjuster wrote to inform claimant that she had another appointment with Dr. Maisel on July 15, 2008.
15. Dr. Jenks did not become authorized due to respondents' failure to timely respond to the April 1 letter. Respondents immediately denied the requested change to Dr. Hall and authorized treatment by any Emergicare physician. Claimant was able to get in to an appointment with Dr. Maisel three weeks later.
16. Dr. Maisel did not refuse to treat claimant for a non-medical reason. He immediately obtained the MRI results, which, in fact, showed improvement in claimant's spine. Dr. Maisel remained authorized to provide treatment, as demonstrated by the July 11 letter.

17. Claimant has failed to make a proper showing for a change of ATP to Dr. Jenks. Dr. Maisel has examined claimant and obtained the MRI. The record evidence does not contain any report by Dr. Jenks. The record evidence does not demonstrate that Dr. Maisel did anything improper. Claimant's lack of comfort with what Dr. Maisel said does not suffice for a change of physician.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The respondents are only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). Under § 8-43-404(5), C.R.S., the respondents are afFed the right, in the first instance, to select a physician to treat the industrial injury. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). If the employer fails to authorize a physician upon claimant's report of need for treatment, claimant is impliedly authorized to choose her own authorized treating physician. *Greager, supra*. Section 8-43-404(5), C.R.S. requires that the respondents designate a physician who is willing and able to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Tellez v. Teledyne Waterpik*, W.C. No. 3-990-062, (Industrial Claim Appeals Office, March 24, 1992). If the designated treating physician refuses to treat the claimant for non-medical reasons, the respondents' duty to select a replacement physician arises immediately upon knowledge that the designated physician has refused to treat. *Tellez v. Wal-Mart Stores Inc.,* W.C. No. 4-413-780 (ICAO July 20, 2000)*; Wesley v. King Soopers,* W.C. No. 3-883-959 (ICAO November 22, 1999); *Clemons v. Harrison School District #2*, W.C. No. 4-357-814 (ICAO, November 30, 2001). In order to change physicians, claimant has a statutory obligation to request that change in accordance with section 8-43-404(5)(a), C.R.S. (2007); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Pursuant to section 8-43-404(5)(a), C.R.S. (2007), the respondents had to respond within 20 days to a written request to change physician. As found, respondents timely responded to the request. Also, as found, Dr. Maisel did not refuse to treat claimant for a non-medical reason. Consequently, Dr. Jenks did not become authorized.

2. Pursuant to section 8-43-404(5)(a), C.R.S. (2007), a change of physician may be ordered prospectively "upon a proper showing." *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). A change of physician is not warranted by the mere fact that a claimant has more faith in a specific doctor or lacks confidence in the employer's doctor. 5 *Larson's Workers' Compensation Law* Section 94.02[3] (1999). As found, claimant has failed to make a proper showing for a change of ATP to Dr. Jenks.

ORDER

It is therefore ordered that:

1. Claimant's request for payment of the bills of Dr. Jenks after April 29, 2008, is denied and dismissed.

2. Claimant's request for a prospective change of physician to Dr. Jenks is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

DATED: November 7, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-636-107

ISSUES

The issues presented for determination were Claimant's claim that she should be found to be permanently, totally disabled as defined in Section 8-40-201 (16.5) (a), C.R.S. and awarded benefits for permanent total disability under Section 8-42-111 C.R.S.

In the alternative, whether Claimant's permanent impairment should be compensated based upon the schedule found in Section 8-42-107 (2), C.R.S. or should be compensated as whole person impairment under Section 8-42-107 (8), C.R.S.

The parties stipulated that the issue of disfigurement would be reserved for future evaluation and determination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant sustained an admitted injury to her right shoulder on December 8, 2004 in the course of her employment as a school bus driver for Employer. Claimant was referred by Employer to Dr. Robert Watson for treatment.

2. Claimant was seen in follow-up by Dr. Watson on January 3, 2005. At this visit, Dr. Watson assigned work restrictions of no lifting or carrying over 5 pounds with the right arm, no repetitive lifting over 5 pounds, and no reaching overhead. Claimant was also restricted from driving. Claimant was next seen by Dr. Watson on January 19, 2005 and the same physical restrictions were continued.

3. Claimant returned to work on/about January 21, 2005 to a light duty Teacher's Aide position at South Elementary School within the School Dis-

trict. Claimant's duties consisted of doing paperwork, helping in some of the classes and monitoring recess and street crossings (Report of Dr. Brunworth 2/28/05, Exhibit C).

4. Dr. Watson referred Claimant to Dr. Mark Failinger. Dr. Failinger initially evaluated Claimant on February 9, 2005. Dr. Failinger recommended a surgical decompression of the right shoulder. Dr. Failinger performed surgery on April 12, 2005 consisting of a debridement and decompression of the right shoulder.

5. Following the surgery in April 2005, Claimant again returned to work at light duty beginning May 19, 2005. Claimant performed work in the transportation office of the Employer consisting of light office work, human resources duties and answering the phone (Exhibit U). At the time Claimant returned to work in May 2005 her physical restrictions from Dr. Watson were lifting up to 5 pounds with no lifting above shoulder level, no carrying or repetitive lifting over 5 pounds and no reaching overhead based upon Dr. Watson's report of May 16, 2005.

6. Claimant was placed at maximum medical improvement by Dr. Watson as of November 2, 2005. Dr. Watson assigned physical restrictions of no lifting greater than 5-10 pounds with the right arm and no lifting above shoulder level at the time he placed Claimant at maximum medical improvement. These restrictions were the result of a functional capacity evaluation done on October 6, 2005 (Exhibit 10).

7. After being placed at MMI in November 2005 and given permanent work restrictions, Claimant was notified by letter from Employer dated November 22, 2005 (Exhibit 15) that the transportation department was unable to accommodate her restrictions. Claimant was encouraged to review available open positions within the School District (Employer).

8. Claimant then applied for the position of and was hired as a Teacher's Aide at Soaring Hawk Elementary School. Claimant's duties were to supervise the kids and classroom, supervise lunch and recess, some paper deliveries to classrooms and office, copy papers and grade papers (Exhibit U, O.T. Resources, Inc., Questionnaire dated 5/5/08). Claimant worked at this part-time position from March 2006 until the end of the school term in June 2006. Claimant performed this job under the same physical restrictions assigned to her by Dr. Watson at the time she was placed at MMI in November 2005. Dr. Watson again saw Claimant on May 15, 2006 at which time the physical restrictions remained permanent and unchanged. (Exhibit 10, report dated May 15, 2006).

9. Dr. Watson referred Claimant to psychologist, Dr. Kaplan, in May 2006. Dr. Watson's referral of Claimant to Dr. Kaplan followed the recommendations of the DIME physician, Dr. Shih, who considered Claimant not to be an

maximum medical improvement and recommended psychological intervention for pain management.

10. Dr. Kaplan initially evaluated Claimant on May 2, 2006. Dr. Kaplan noted in his report that Claimant had returned to work as a Teacher's Aide on March 22, 2006 working six hours per day, five days a week. Dr. Kaplan further stated that while Claimant had work restrictions, she was able to carry out her current work duties.

11. Dr. Kaplan again saw Claimant on May 22, 2006. Dr. Kaplan reported that Claimant was able to tolerate her job duties with work limitations and restrictions. Claimant reported no change in her pain levels to Dr. Kaplan.

12. Dr. Shih saw Claimant for a follow-up DIME appointment on August 31, 2006. Dr. Shih placed Claimant at maximum medical improvement as of July 19, 2006.

13. After being placed at MMI by Dr. Shih, Claimant sought further treatment for her right shoulder through her personal physician and was referred to Dr. Steven Topper, M.D. Dr. Topper examined Claimant on October 19, 2006 and recommended an MRI of the shoulder. At the time she was seen in October 2006 by Dr. Topper Claimant was complaining of occasional sharp or shooting pain that had become progressively worse and was aggravated by overhead activity. The severity of the pain was reported by Claimant to be moderate to severe.

14. At the request of the Insurer, Claimant was seen for an independent medical examination by Dr. William Shaw, M.D. on December 19, 2006 (Exhibit K). Claimant reported to Dr. Shaw that she had the physical capacity to perform the functions of office work and as a teacher's aide when she was performing those activities. Dr. Shaw opined, and it is found, that there were no medical contraindications to Claimant returning to work in the capacity of office work or as a teacher's aide.

15. Dr. Topper performed arthroscopic surgery on Claimant's right shoulder on January 9, 2007. This surgery consisted of extensive debridement of the glenohumeral joint including SLAP and rotator cuff tears and mini open distal clavicle excision.

16. Dr. Topper saw Claimant for surgical follow-up on April 23, 2007. Dr. Topper noted that Claimant's pre-operative symptoms had resolved.

17. Dr. Topper again saw Claimant on July 16, 2007. Claimant stated to the physician that she was 95% improved with the surgery and that her pain had resolved. Claimant told Dr. Topper that she wanted to return to work, but was worried about the workload. Claimant testified, and it is found, that the surgery by Dr. Topper in 2007 made a big difference in her pain symptoms, in-

creased the mobility in her arm and that she felt better both physically and mentally after the surgery.

18. Dr. Topper referred Claimant to Dr. Jack Rook, M.D. for evaluation of permanent impairment and work restrictions. Dr. Rook evaluated Claimant on September 14, 2007. Dr. Rook placed Claimant at maximum medical improvement, noting that her condition had improved as a result of the surgery done by Dr. Topper. Dr. Rook assigned a 24% impairment of the upper extremity that converted to 14% whole person impairment.

19. Dr. Rook placed work restrictions of no lifting/carrying over 5 pounds, occasional push/pull of up to 10 pounds, no reaching above shoulder with the right arm and occasional repetitive use of the upper extremity. These restrictions were considered to be permanent.

20. Claimant was capable of performing the duties of a Teacher's Aide within the physical restrictions of no lifting greater than 5-10 pounds and no overhead lifting as assigned by Dr. Watson. Claimant did not stop working in the Teacher's Aide position for reasons related to her physical restrictions or physical inability to perform the work related to the effects of her compensable injury. The ALJ finds that the opinion of Dr. Shaw expressed in his December 19, 2006 report that there are no medical contraindications to Claimant returning to work in light office work or as a Teacher's Aide to be credible, persuasive and is found as fact.

21. Claimant applied for various Educational Assistant positions with Employer during July 2006. In each of her applications, Claimant stated "I meet or exceed all job discription (sic) and Requirements for the for which I am Applying."

22. At the request of Insurer, Margo Burns performed a vocational evaluation of Claimant and issued a report dated June 18, 2008. Claimant stated to Ms. Burns that she walks 10,000 steps per day. Ms. Burns noted, and it is found, that Claimant's daily tasks included paperwork, paying bills, running errands, doing grocery shopping, watching television and reading.

23. At the time Claimant was evaluated by Margo Burns, Claimant had not applied for any jobs since 2006. Claimant reported to Ms. Burns that she would return to work as a Teacher's Aide with Employer if a job were available.

24. Ms. Burns noted that several of the positions as an Educational Assistant for which Claimant had applied would have exceeded her restrictions. However, Claimant is capable of performing lighter duty positions as an Educational Assistant I and had applied for those positions. As reflected in the report of Ms. Burns, Claimant either gave incorrect contact information or did not return calls for interviews for two of the positions for which she was qualified.

25. Ms. Burns conducted labor market research and found open positions with Employer for Instructional Assistants, Educational Assistant I, Child Care Program Leader or Program Aide, Receptionist and Volunteer Coordinator. Ms. Burns opined, and it is found, that these jobs would be physically appropriate for Claimant. Ms. Burns also identified open positions outside of the Employer as a ticket seller in a movie theatre or as a security gate guard.

26. In reaching her conclusions, Ms. Burns applied the restrictions assigned by Dr. Rook. The ALJ finds that Dr. Rook's restrictions are not representative of Claimant's physical capacity and understate her physical abilities. The jobs identified by Ms. Burns would comply with the physical restrictions and opinion of Dr. Shaw as found above. As opined by Ms. Burns, Claimant remains employable in entry-level light jobs such as teacher's aide, ticket seller, or security gate guard. Claimant is not permanently, totally disabled.

27. Subsequent to the evaluation by Dr. Rook, a second Division IME was performed by Dr. James Lindberg on January 28, 2008. Dr. Lindberg assigned the same impairment rating as Dr. Rook and concluded that Claimant was at maximum medical improvement.

28. Claimant experiences persistent pain from her right shoulder into her neck and from the shoulder down into the back in the area of the shoulder blade. Claimant has significant limitations in motion of the shoulder and cannot flex or raise her right arm above shoulder level. Dr. Shaw noted diffuse complaints of tenderness to palpation throughout the right paracervical, upper back and shoulder girdle. These complaints affect Claimant's cervical or neck rotation to the right as noted by Dr. Shaw. The tenderness and pain experienced in the paracervical and upper back areas affects the physical function of these areas.

CONCLUSIONS OF LAW

29. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

30. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792

(1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

31. Claimant is entitled to PTD benefits if she proves by a preponderance of the evidence that she is unable to earn wages in the same or other employment. C.R.S. § 8-40-201(16.5)(a); *Holly Nursing Care Center v. Industrial Claim_Appeals Office*, 992 P.2d 701 (Colo. App. 1999). In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Another human factor is the claimant's ability to obtain and maintain employment within her physical abilities. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining employment. *See Christie v. Coors Transportation Co.*, *supra*; *Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (January 16, 1997), aff'd, *Econ. Lube N Tune v. Cotton* (Colo. App. No. 97CA0193, July 17, 1997). The determination of whether Claimant has met the burden of proof is one of fact for determination by the ALJ. *Weld County School District RE-12 v. Bymer*, *supra; Holly Nursing Care Center v. Industrial Claim Appeals Office, supra.*

32. In reaching the conclusion that Dr. Shaw's opinion regarding the Claimant's ability to work is persuasive, the ALJ has placed significant weight upon Claimant's own testimony that a further surgery by Dr. Topper in 2007 made a big difference in her pain symptoms, increased the mobility in her arm and that she felt better both physically and mentally after the surgery. The ALJ also finds support for this conclusion in the reports of Dr. Topper of April 23, 2007 stated that Claimant's pre-operative symptoms had resolved and Dr. Topper's report of July 16, 2007 at which time Claimant stated to the physician that she was 95% improved after the surgery and wanted to go back to work. In addition, as discussed above, Claimant represented to Dr. Kaplan that she was capable of performing work as a Teacher's Aide at a time when her symptoms were worse than they were after the surgery performed by Dr. Topper. Claimant's testimony at hearing that she does not feel she can return to work within the restrictions is not considered persuasive. Claimant's testimony that she cannot work within the restrictions is inconsistent with her representations concerning her condition after surgery to Dr. Topper. The ALJ resolves this conflict in favor of the statements contained in the reports of Dr. Topper. The subsequent work restrictions given by Dr. Rook are not persuasive in light of Claimant's own reports of the results of the surgery done by Dr. Topper that occurred after Dr. Shaw's evaluation. Dr. Rook's restrictions as not dissimilar from those given by Dr. Watson at the time he placed Claimant at MMI in November 2005. Claimant was able to work in office work and as a Teacher's Aide within the restrictions given by Dr. Watson. For Dr. Rook's restrictions to be accurate, Claimant's condition would have to

have essentially stayed the same after the surgery by Dr. Topper, not substantially improved as testified by Claimant and reported by Dr. Topper.

33. The ALJ concludes that Claimant has failed to sustain her burden of proof to show that she is permanently and totally disabled. In reaching this conclusion, the ALJ places greater weight upon the opinions of Respondent's expert, Margo Burns, than those of Claimant's expert, Doris Shriver. As reported by Ms. Burns, Claimant has sought other Teacher Aide positions and was contacted for interviews that did not occur because Claimant either gave incorrect contact information or did not return the calls. (Exhibit S, report page 10, Bates 000091). Ms. Shriver's testimony that there are no jobs available for Claimant within her restrictions is directly contradicted by the fact that Claimant applied for and obtained a light duty Teacher Aide position at Soaring Hawk Elementary and was capable of performing that work within her restrictions. The ALJ finds the labor market analysis and methodology used by Ms. Burns to be more credible and persuasive than that of Ms. Shriver. Ms. Shriver never personally evaluated Claimant. Ms. Shriver relied upon a general description of job duties from a national labor market database rather than specific contacts with local employers. That Claimant has not yet been hired for another position, either with the School District or another employer, is not considered persuasive to show that Claimant cannot obtain employment within her restrictions and be able to maintain such employment. As found, the opinions of Margo Burns are persuasive to show that Claimant remains employable within her physical capacity.

34. The ALJ initially issued a Summary Order dated October 23, 2008. Subsequent to that Summary Order, Claimant filed a Motion for Reconsideration in addition to a request for specific findings of fact. In her Motion, Claimant argues that the opinions of her expert, Doris Shriver, are unrebutted and that the work restrictions of Dr. Rook should be considered to be Claimant's permanent work restrictions by which her employability and claim for permanent total benefits should be assessed. In short, the Claimant argues that the ALJ was required to find that she was permanently totally disabled based upon the opinions of Dr. Rook and Doris Shriver. The ALJ disagrees. The ALJ is under no obligation to credit medical testimony even if such testimony is unrebutted. *Cary v. Chevron U.S.A., Inc.,* 867 P.2d 117 (Colo. App. 1993). The weight and credibility to be assigned expert testimony or opinions is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3fd 186 (Colo. App. 2002). The ALJ resolves conflicts in the evidence, makes credibility determinations, and draws plausible inferences from the evidence. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002). Thus, even in the absence of the opinions of Dr. Shaw and Ms. Burns, the ALJ would not be compelled to credit the opinions of Dr. Rook and Ms. Shriver. To the extent that Claimant's Motion requests the ALJ to re-weigh the evidence and reach a result in favor of Claimant, the ALJ declines to do so.

35. Section 8-42-107(1)(a), C.R.S. 2004, limits a claimant to a scheduled disability award if the claimant suffers an "injury or injuries" described in § 8-42-107(2), C.R.S. 2004. Strauch v. PSL Swedish Healthcare System, 917 P.2d

366 (Colo. App. 1996). The term "injury," as used in § 8-42-107(1)(a), refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself. Walker v. Jim Fuoco Motor Co., 942 P.2d 1390 (Colo. App. 1997). Whether a claimant has suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ, whose determination must be upheld if it is supported by substantial evidence. Walker v. Jim Fuoco Motor Co.,supra. That determination is distinct from, and should not be confused with, the treating physician's rating of physical impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment (rev. 3d ed.) (AMA Guides). Strauch v. PSL Swedish Healthcare System, supra; see also City Market, Inc. v. Indus. Claim Appeals Office, 68 P.3d 601, 603 (Colo. App. 2003)("The determination whether a claimant sustained a scheduled or nonscheduled injury is a question of fact or the ALJ, not the rating physician."). Kolar v. ICAO, 122 P.3d 1075 (Colo. App. 2005).

36. The ALJ concludes that Claimant has proven, by a preponderance of the evidence that the situs of functional impairment is above the level of the arm at the shoulder. Accordingly, Claimant's permanent impairment should be compensated as whole person impairment under Section 8-42-107(8), C.R.S. The pain and tenderness in the paracervical and upper back areas that impairs the function of these areas is sufficient to establish whole person impairment. *Salaz v. Phase II Co., W.C. No. 4-240-376 (November 19, 1997), aff'd., Phase II Co. v. Indus. Claim Appeals Office, (Colo. App. No. 97 CA 2099, September 3, 1998, NSOP), Webb v. Circuit City Stores, Inc., W.C. No. 4-467-005 (August 16, 2002).*

37. At hearing, Respondent's stated that they did not contest the ratings of Dr. Lindberg with respect to the whole person impairment. Therefore, as Claimant's impairment is to be converted to whole person impairment, the whole person impairment should be 14% as assessed by Dr. Lindberg.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability is denied and dismissed.
2. Claimant is entitled to compensation for permanent partial benefits for 14% whole person impairment as provided in Section 8-42-107(8), C.R.S. Respondents are entitled to credit for all amounts of permanent partial benefits previously paid pursuant to the Final Admission of March 4, 2008.
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

November 14, 2008 Ted A. Krumreich

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-664-944

ISSUE

The issue for determination is Richard Blundell's request for attorney fees.

FINDINGS OF FACT

1. Claimant alleged she sustained a compensable injury on December 29, 2006. Claimant also alleges injuries on other dates and Claimant has had prior compensable injuries.

2. Claimant retained Richard Blundell in January 2007 to represent her in connection with her workers' compensation claims. The Contingent Fee Agreement (fee agreement) signed by Claimant and Blundell contained the following pertinent paragraphs:

> We have discussed alternate agreements, including contingent, hourly, per diem, and fixed fees. I agree to pay said Attorney for services in this case a maximum fee of Twenty Percent (20%) of any and all payments recovered on any contested matters, *except as otherwise stated herein*. (Emphasis added).
>
> If the undersigned's services terminate prior to *any recovery* herein, the undersigned shall be entitled to receive in satisfaction of *all fees due* hereunder an amount equal to the greater of: (a) *his percentage fee stated above applied to any then outstanding settlement offer*; or (b) the proportion of the total fee ultimately charged the client in this matter from any subsequent recovery which fairly represents the reasonable value of the legal services rendered or the contribution of the undersigned's efforts to the amount recovered. (Emphasis added).

3. Claimant became frustrated and unhappy with the representation that Richard Blundell was providing to her. She was unhappy that her claims did not appear to be progressing, her medical bills were not paid, she did not receive a copy of Dr. Theil's restrictions, two settlement hearings had been postponed at the last minute, and she felt that she was unable to discuss her claims directly with Blundell as she wished. Claimant also was unhappy that Blundell had become angry and yelled at her or his office staff in her presence. Further, in November 2007, Claimant was to meet with Ira Sanders, who she was told would represent her at any hearing. When Claimant appeared for that meeting, she found that Sanders was not there. On December 24, 2007, Claimant had an appointment with Blundell and Blundell did not appear for that meeting.

4. In December 2007, Blundell obtained a settlement offer from Respondents for $35,000.00. Blundell, on behalf of Claimant, countered for a much higher figure.
5. In December 2007, Respondents also agreed to a one-time evaluation with Dr. Thiel.
6. Claimant terminated the services of Blundell on January 9, 2008. Blundell filed a motion to withdraw on January 31, 2008, and that motion was granted on February 14, 2008. Claimant proceeded without counsel.
7. Prior to the termination of his services, Blundell incurred expenses and costs to prosecute Claimant's claims in the amount of $245.42. Blundell has also requested $215.75 for copying after the termination of his services.
8. Dr. Thiel examined Claimant in March 2008.
9. In May 2008, Claimant settled eight claims with Respondents, including the claim with this W.C. number, for an amount in excess of the $35,000.00 offer obtained by Blundell.

CONCLUSIONS OF LAW

1. The ALJ has statutory authority to determine the "reasonableness of the fee charged by" Blundell. Section 8-43-403(1), C.R.S. Section 8-43-403(2), C.R.S., requires a written fee agreement setting forth the "specific fee arrangement" and "circumstances in which any modifications or adjustments to such fee will be made." The fee agreement represents a contract between Claimant and Blundell. The agreement should be enforced as written to the extent it is plain, clear, and no absurdity is involved. *See Cary v. Chevron U.S.A., Inc.,* 867 P.2d 117 (Colo. App. 1993); *Loar v. Want ads of Fort Collins,* W.C. No. 4-481-416 (ICAO, 2004).
2. Under the plain terms of the fee agreement, if Blundell was terminated before "any recovery" received by Claimant, Blundell's fee was to be determined by the greater of 20 percent of any outstanding settlement agreement or option "b." At the time Claimant terminated his services, there was an outstanding settlement offer for $35,000.00. Twenty percent of that amount, $7,000.00, is a reasonable fee for Blundell's services.
3. During the prosecution of Claimant's claims, Blundell incurred costs of $245.42. Claimant is liable for those costs. After the termination of his services, Blundell incurred copying costs. However, those costs were not to prosecute Claimant's claims, and therefore are not reasonably the costs of Claimant. Claimant is not liable for those costs incurred after she terminated Blundell's services.

ORDER

It is therefore ordered that Claimant shall pay Richard Blundell attorney fees and costs in the amount of $7,245.42.

DATED: *November 19, 2008*

Bruce Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 4-675-855

ISSUES

The sole issue determined herein is claimant's petition to reopen based upon a change of condition.

FINDINGS OF FACT

1. Claimant was born on May 12, 1956, and was 52 years of age at the time of the hearing. Claimant weighs approximately 275 pounds and has been diagnosed with rheumatoid arthritis in his hands and joints.

2. In March 2005, claimant began employment as a sales associate with the employer.

3. On May 7, 2005, claimant suffered an admitted work injury to his mid-back after moving pallets of dog food and pushing carts in the employer's parking lot.

4. Claimant was referred by the employer Concentra, where he was initially examined by Keith Kesten, D.O. Dr. Kesten diagnosed claimant with a thoracic strain and right rib pain. Claimant was treated with physical therapy, chiropractic treatment, and osteopathic treatment.

5. On July 29, 2005 claimant had a magnetic resonance image ("MRI") of his thoracic spine that demonstrated sizable predominately left-sided posterior and inferior extrusion of the T7-8 disc with mild cord compression; shallow protrusions of the T4-5, T5-6, T6-7, T8-9, T10-11, and T12-L1 discs associated with partial effacement of the subarachnoid, but no cord compression; and mild multilevel anterior degenerative spondylosis.

6. On August 10, 2005, Daniel Baer, D.O., examined claimant. Dr. Baer diagnosed claimant with a thoracic strain and degenerative disc disease at multiple levels of his thoracic spine. Dr. Baer performed epidural steroid injections.

7. On November 1, 2005, Dr. Hattem examined claimant, who complained of right pariscapular thoracic pain.

8. On December 15, 2005, claimant underwent a functional capacity evaluation ("FCE") that showed his ability to lift 45 pounds, carry 25 pounds, sit for 45 minutes, and stand for 90 minutes.

9. On December 27, 2005, Dr. Hattem determined that claimant reached maximum medical improvement ("MMI"). At MMI, claimant continued to complain of persistent mid-back pain. Claimant reported that he did not experience any improvement at all since the injury in May 2005. Dr. Hattem released claimant to return to his regular duty

work, but imposed permanent restrictions consistent with the FCE. Dr. Hattem determined that claimant suffered 10% whole person impairment due to the work injury. Dr. Hattem indicated that claimant did not need post-MMI medical care.

10. On February 2, 2006, the insurer filed a final admission of liability for permanent partial disability benefits and for post-MMI medical benefits.

11. On January 9, 2006, claimant returned to Dr. Hattem for a prescription refill. Concentra physicians prescribed medication refills on January 9, 2006, February 2, 2006, and March 7, 2006. On February 2, 2006, Dr. Hattem reexamined claimant, who continued to complain of mid-back pain.

12. Claimant returned to work for the employer in the Photo Lab on a full-time basis.

13. Claimant, on his own, sought unauthorized healthcare through his primary care physician, Douglas Clark, M.D. On April 12, 2006, Dr. Clark documented that claimant was obese, weighing 266lbs. On April 19, 2006, Dr. Clark recommended that claimant lose weight. Claimant did not lose weight, but continued to gain weight.

14. On April 28, 2006, Dr. Zyskowski diagnosed claimant with early rheumatoid arthritis.

15. Dr. Clark referred claimant to Dr. Sandell for treatment of mid-back pain. Dr. Sandell first saw claimant on October 24, 2006. Claimant reported mid-back pain with very little activity. Dr. Sandell noted that claimant's weight gain was likely now becoming a contributing factor to his pain problems. Dr. Sandell diagnosed radicular pain versus chronic muscular pain and recommended medications and pool therapy.

16. Claimant was re-examined by Dr. Sandell on January 15, 2007. Dr. Sandell noted that claimant continued to have the same symptoms and did not report any significant change.

17. On January 18, 2007, Dr. Hattem responded to correspondence from the adjuster and concluded that claimant's recurrent pain was not related to the work injury.

18. On February 5, 2007, Dr. Zyskowski reexamined claimant, who reported increased pain in his hands. Dr. Zyskowski diagnosed a flare up of the rheumatoid arthritis.

19. On March 6, 2007, claimant reported no change in his condition. Dr. Sandell recommended trigger point injections. Dr. Sandell noted that claimant was reluctant to proceed after finding out that he was responsible for co-payments on the medical appointments. Claimant elected to obtain the injections through his personal care physician under his health insurance.

20. On August 10, 2007, Dr. Sandell reexamined claimant, who reported increased symptoms, but denied any new injury. Dr. Sandell diagnosed chronic muscular pain. Dr. Sandell orally informed claimant that he should be limited to sedentary work.

21. Claimant informed the employer of his new restrictions to sedentary employment. The employer informed claimant that no such work was available for him. Claimant took a medical leave of absence from work and began receiving short-term disability benefits effective August 4, 2007.

22. After leaving work, claimant did not experience any decrease in his mid-back pain.

23. Claimant underwent a repeat thoracic MRI on October 8, 2007. The MRI showed T7-8 central disc herniation with mild thoracic cord flattening, relatively stable from the prior study; small disc herniations or protrusions at several levels, including T4-5, T6-7 and T8-T9 and T11-12, without evidence of thoracic cord compression; and multilevel degenerative disc disease and spondylosis.

24. The MRI findings on October 8, 2007 are unchanged from July 29, 2005, as noted by Dr. Sandell, Dr. Sung, and Dr. Hattem. The T7-8 disc herniation is of questionable relevance for claimant's symptoms because he primarily suffers chronic muscular pain.

25. Dr. Sandell referred claimant to Dr. Sung. On November 8, 2007, Dr. Sung evaluated claimant and diagnosed thoracic spine degenerative disc disease. Dr. Sung recommended a possible trial of a spinal stimulator.

26. On December 13, 2007, Dr. Zyskowski reexamined claimant, who reported developing morning stiffness, pain, and swelling, and pain in his back radiating to his hips. Dr. Zyskowski's impression was that claimant suffered progressing rheumatoid arthritis.

27. On December 31, 2007, claimant's health insurance coverage ended.

28. Dr. Sandell referred claimant to Dr. Mitchell. On January 29, 2008, Dr. Mitchell examined claimant and recommended a possible spinal stimulator or pain pump, but he noted that he first needed to review all of claimant's previous medical records.

29. On February 15, 2008, Dr. Corbett, a rheumatologist, examined claimant, who reported increased left hip pain because of a recent fall. Dr. Corbett recommended that claimant stop use of Piroxicam and continue Relafen.

30. On February 29, 2008, Dr. Sandell reexamined claimant, who reported that the rheumatologist told him to stop the Relafen. Claimant reported increased pain since stopping the Relafen, so Dr. Sandell prescribed Darvocet.

31. On May 21, 2008, Dr. Sandell, based only upon the February 29 examination, imposed restrictions against lifting over 10 pounds, standing more than two hours, and reaching more than occasionally. Dr. Sandell also indicated that claimant should alternate sitting and standing.

32. On an unknown date, claimant petitioned to reopen this claim based upon a change of condition.

33. On June 17, 2008, Dr. Hattem reexamined claimant, who reported that he was worse than one year earlier. Dr. Hattem indicated that he needed to review the previous medical records.

34. On August 12, 2008, Dr. Hattem reported that Dr. Sandell had agreed that claimant needed no further conservative treatment. Dr. Hattem concluded that claimant's rheumatoid arthritis was contributing to his pain and that a spinal stimulator was not appropriate. Dr. Hattem concluded that claimant was still at MMI and needed only medications as post-MMI maintenance treatment.

35. At hearing, claimant testified that suffered increasing symptoms in mid 2007 due to both work and activities of daily living.

36. At hearing, Dr. Sandell admitted that claimant's rheumatoid arthritis could be contributing to thoracic spine pain, although not to his muscular pain. Dr. Sandell also agreed that claimant's obesity could affect his back muscles. Dr. Sandell did not know if the degenerative changes were causing the symptoms.

37. At hearing, Dr. Hattem testified that active rheumatoid arthritis could affect the costovertebral joints in the mid-back. Dr. Hattem testified that the increasing symptoms in mid 2007 were possibly due to the rheumatoid arthritis. Dr. Hattem concluded that claimant's symptoms were multi-factorial: his rheumatoid arthritis, degenerative changes, and weight gain. He noted that claimant had no changes on MRI scans. Dr. Hattem concluded that the degenerative changes were not due to the work injury. He explained that claimant's thoracic strain did not cause a worsening of the spine condition.

38. Claimant failed to prove by a preponderance of the evidence that he suffered a change of his condition as a natural consequence of his admitted May 7, 2005, work injury. His MRI findings are unchanged. His T7-8 disc herniation is of questionable relevance for his symptoms. He had primarily chronic muscular pain due to the work injury. He has complicating factors from rheumatoid arthritis and obesity. He had persistent right-sided thoracic pain at MMI and thereafter. He reported increasing symptoms in mid-2007, due to both work and activities of daily living. After losing his health insurance benefits, he sought to reopen this workers' compensation claim. The opinions of Dr. Hattem, supported by the opinions of Dr. Sandell, are persuasive. Claimant might be worse than at MMI, but any such worsening is not as a natural consequence of the work injury.

CONCLUSIONS OF LAW

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Claimant must prove that his change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant failed to prove by a preponderance of the evidence that he suffered a change of his condition as a natural consequence of his admitted May 7, 2005, work injury.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

DATED: November 6, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-685-629

ISSUES

Claimant sought to overcome the division independent medical examination (DIME) opinion with respect to permanent partial disability (PPD) and causation/relatedness with respect to the low back and right shoulder. Additionally, Claimant sought post-maximum medical improvement (MMI) *Grover*-type medical care.

FINDINGS OF FACT

1. Claimant suffered a work-related injury in February 2006. Claimant was initially treated for shoulder pain for his work-injury with Dr. Rosemary Greenslade and as indicated by Dr. Greenslade on April 28, 2006, Claimant's shoulder pain resolved after a subacromial injection on April 21, 2006. Subsequent medical records are inadequate to establish that Claimant's shoulder complaints at the time of his visit to Dr. Rook are related to the industrial injury. However, Claimant's cervical condition was determined to be related to the February 2006 work injury.

2. After Claimant's treating physician, Dr. Darrel Quick placed him at MMI on April 20, 2007, Dr. Jeffrey Wunder conducted a DIME of the Claimant on August 6, 2007. Dr. Wunder's "Impression" was: cervical strain; underlying cervical degenerative disc disease; right C7 radiculitis; and, nonspecific low back pain unrelated to work injury. Dr. Wunder found that Claimant was not at MMI for his work injury and recommended additional care addressing only the Claimant's cervical complaints.

3. After the additional care, including a C5 to C-7 anterior cervical discectomy, Claimant was again put at MMI and returned to Dr. Wunder for a follow-up DIME on May 8, 2008. Dr. Wunder determined the Claimant was at MMI for his industrial injuries and agreed with the treating physician's date of MMI of March 17, 2008. Dr. Wunder's "Impression" was: chronic neck pain; status post-C5 to C7 anterior cervical discectomy and fusion; and psychological factors. Dr. Wunder provided a whole person rating of 17%.

4. Claimant claims that he also has low back symptomology that he believes is related to his work injury. The medical documentation does not provide sufficient substantiation to conclude that any low back symptoms are related to the industrial injury, including Claimant's procured IME from Dr. Jack Rook. Dr. Wunder in his first DIME specifically found Claimant's low back condition to be non-work-related. Dr. Wunder's follow-up DIME does not find a causal connection and by implication again rejects Claimant's low back claim.

5. Claimant underwent an independent medical evaluation by Dr. Rook on August 19, 2008. Dr. Rook reviewed Claimant's medical records and performed an evaluation of Claimant. Additionally, Dr. Rook sent the Claimant for range of motion testing to a physical therapist. Dr. Rook opines that Claimant is not at MMI because he believes the Claimant's shoulder complaints at the time of his examination are related to the work-injury. He cites, *inter alia*, the results of the Claimant's MRI conducted on April 13, 2006, which indicated Claimant had a supraspinatus distal tendon undersurface low-grade partial thickness tear; subdeltoid/subacromial bursitis; superior labral fraying; and, AC joint early degenerative change. These are the same MRI results used by Dr. Greenslade prior to performing a subacromial injection.

6. Dr. Rook provided an impairment rating of 34% whole person if Claimant's low back condition is unrelated and 45% whole person if Claimant's low back condition is found to be related to his work injury.

7. The ALJ finds that the medical evidence submitted fails to establish by clear and convincing evidence that it is highly probable that Dr. Wunder's opinions are incorrect with respect to Claimant's PPD claim. The evidence establishes only a difference of opinion between Dr. Rook and Dr. Wunder.

8. By failing to specifically find that Claimant's low back symptomology was related to his industrial injury Dr. Wunder implicitly found that it was not part of Claimant's work injury. The ALJ finds that Dr. Wunder's opinion as to causation of Claimant's low back symptomology, based upon the Claimant's medical history available to him, is more persuasive than Dr. Rook's equivocal opinion. Claimant has failed to establish by clear and convincing evidence that it is highly probable that Dr. Wunder's opinion on causation of Claimant's low back symptomology is incorrect. The evidence establishes only a difference of opinion between Dr. Rook and Dr. Wunder.

9. By failing to specifically find that Claimant's shoulder symptomology was related to his industrial injury Dr. Wunder implicitly found that it was not part of Claimant's work

injury. The ALJ finds that Dr. Wunder's opinion as to causation of Claimant's shoulder symptomology, based upon the Claimant's medical history available to him, is more persuasive than Dr. Rook's contrary opinion. Claimant has failed to establish by clear and convincing evidence that it is highly probable that Dr. Wunder's opinion on causation of Claimant's low back symptomology is incorrect. The evidence establishes only a difference of opinion between Dr. Rook and Dr. Wunder.

10. Since the ALJ finds that Claimant's shoulder condition is not work related it follows that post-MMI *Grover* benefits for Claimant's shoulder are moot. To the extent that Claimant is requesting *Grover* benefits for his work-related injury, the ALJ finds Dr. Wunder's opinion that no maintenance treatment is necessary to be persuasive. Claimant has failed to establish by a preponderance of the evidence that he is entitled to any *Grover* medical benefits.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2007), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2007). Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. (2007). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. (2007).

2. Sections 8-42-107(8)(b)(III) and (c), C.R.S. (2007), provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

3. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

4. After the Claimant reaches maximum medical improvement the Claimant may obtain future medical benefits only to maintain maximum medical improvement or to prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705, 711 (Colo. 1988). The Claimant is therefore entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995)*; Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

5. In accordance with Section 8-43-215, C.R.S. (2007), this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. As found above, Claimant has failed to overcome the DIME physician's findings with respect to PPD or causation of Claimant's low back and shoulder symptomology.

8. Claimant has failed to produce substantial evidence to establish by a preponderance of the evidence that he is entitled to post-MMI *Grover* benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim to overcome the DIME with respect PPD is denied and dismissed.
2. Claimant's claim for overcoming the DIME with respect to causation/relatedness of his low back and shoulder symptomology is denied and dismissed.
3. Claimant's claim for post-MMI treatment of his condition is denied and dismissed.
4. Any and all issues not determined herein are reserved for future decision.
5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

DATE: November 28, 2008

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-691-723

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the Division Independent Medical Examination (DIME) physician's determination that he reached Maximum Medical Improvement (MMI) on March 20, 2007.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits and Temporary Total Disability (TTD) benefits from January 17, 2007 until terminated by statute.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

5. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant worked as a welder for Employer. On June 13, 2006 he sustained an industrial injury to his right wrist during the course and scope of his employment.
2. Claimant underwent two surgeries in order to repair his right wrist. On August 4, 2006 Insurer filed a General Admission of Liability acknowledging that Claimant was entitled to medical benefits, TTD benefits beginning on July 18, 2006, and an AWW of $613.68. An AWW of $613.68 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.
3. Termination from Employment
4. On October 31, 2006 Claimant was released to work with restrictions that included no use of his right arm. On December 15, 2006 Employer offered Claimant modified employment consistent with his work restrictions. Employer directed Claimant to report to work on December 26, 2006 at 8:00 a.m.
5. On the morning of December 26, 2006 Claimant underwent an evaluation with Mark Durbin, M.D. Dr. Durbin assigned Claimant work restrictions that prohibited Claimant from lifting, carrying, pushing and pulling more than two pounds and referred Claimant for physical therapy three times each week. Claimant then reported for modi-

fied employment. Over the ensuing days, Claimant performed modified duties but was ultimately terminated on January 17, 2007 for excessive absenteeism.

6. The decision of a Hearing Officer regarding Claimant's unemployment insurance benefits was included as an exhibit in the record. The decision reveals that Claimant attended physical therapy sessions on December 27-29, 2006. He left work early on December 29, 2006 with a number of other employees who were sent home early for the day. On January 2, 2007 Claimant contacted Employer and stated that he could not report to work because of wrist pain. On January 4, 2007 Claimant was late for work because he had a scheduled physical therapy appointment. On January 9, 2007 Claimant left work early because of wrist pain. On January 10, 2007 Claimant reported to work approximately 15 minutes late. On January 12, 2007 Claimant attended a morning doctor's appointment that was not related to his work injury and an afternoon physical therapy appointment that was related to his work-injury. On January 16, 2008 Claimant told Employer's shop foreman that he needed to leave work at 10:00 a.m. for personal reasons but refused to explain the details of his request. The appointment was with Claimant's mental health provider. Claimant explained that in additional to his medical appointments he took some time off from work because he was suffering from pain and needed to care for his children.

7. In contrast, a review of the physical therapy records reveals that Claimant did not have an appointment scheduled for January 4, 2007 and he did not attend his scheduled January 12, 2007 appointment. Moreover, Employer's shop foreman explained that Claimant failed to provide notes regarding attendance at physician's appointments or physical therapy. The shop foreman commented that he discussed tardiness and attendance problems with Claimant on two occasions.

8. Respondents have failed to demonstrate it is more probably true than not that Claimant committed a volitional act or exercised some control over his termination. Although Claimant missed parts of several scheduled work shifts between December 26, 2006 and January 16, 2007, many of the absences were caused by medical and physical therapy appointments related to his industrial injury. Small portions of Claimant's absences were related to non-work-related medical conditions or personal matters. Furthermore, because Claimant was generally terminated for excessive absenteeism, it is unclear whether the reasons for the termination included medical appointments that were related to his industrial injury. Finally, although Claimant's shop foreman specified that he discussed tardiness and attendance problems with Claimant on two occasions, there is no evidence that Claimant was apprised that any additional attendance problems would result in termination. Because the primary reasons for Claimant's absences involved his wrist injury, he did not exercise control over his termination under the totality of the circumstances.

9. MMI and DIME

10. After his termination, Claimant continued to receive medical care from his authorized treating physicians. On March 20, 2007 Dr. Durbin noted that Claimant was still doing poorly. He opined that Claimant should be placed at MMI because he did not feel that there was anything else that could be done for Claimant. Nevertheless, he stated that Claimant should be re-evaluated in six months to make sure that his condition was not worsening.

11. Claimant was referred to Gregory Reichhardt, M.D. for a report regarding MMI and impairment. Dr. Reichhardt agreed with Dr. Durbin that Claimant had reached MMI on March 20, 2007. He assigned Claimant a 13% upper extremity impairment rating based on right wrist range of motion deficits and a neurologic impairment to the ulnar nerve. Dr. Reichhardt recommended medical maintenance benefits.

12. On April 26, 2007 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Reichhardt's determination of MMI and impairment rating. Claimant objected to the FAL and sought a DIME. Joseph Fillmore, M.D. was selected to perform the DIME.

13. On September 17, 2007 Claimant underwent the DIME. Dr. Fillmore agreed with Dr. Reichhardt that Claimant had reached MMI on March 20, 2007. He assigned Claimant a 20% whole person impairment rating based on range of motion deficits and hypersensitivity in the ulnar distribution of the hand. Dr. Fillmore recommended medical maintenance care that included referral to a pain management specialist for medication management and follow-up with Dr. Durbin for maintenance treatment.

14. FAL and Objection

15. On November 2, 2007 Insurer filed a FAL consistent with Dr. Fillmore's DIME report. Claimant objected to the FAL and filed an Application for Hearing on November 30, 2007. Claimant endorsed the following issues for hearing: medical benefits; AWW; disfigurement; TTD benefits from 1/17/07 to 4/17/07; TPD benefits from various; permanent partial disability benefits; *Grover* medical care; treatment to maintain MMI; and that he was not at fault for his termination from employment.

16. On April 8, 2008 Claimant filed a second Application for Hearing. The second application contained identical issues to those listed in the November 2, 2007 application.

17. The applications for hearing also specified that other issued to be considered at the hearing included "*Grover* Medical Care, treatment to maintain MMI; Claimant objects to Final Admission dated 11/02/07. Claimant is not at fault for his termination from Respondent/Employer."

18. Claimant's applications for hearing did not expressly provide that he sought to challenge Dr. Fillmore's DIME determination. However, they specifically stated that he objected to the FAL. Insurer's FAL was based on Dr. Fillmore's DIME determination. Therefore, Claimant's specific objection to the FAL reflected that he disagreed with the DIME determination. Accordingly, Claimant's hearing applications encompassed a challenge Dr. Fillmore's MMI finding.

19. Medical Treatment and Opinions

20. During the period November 2007 through February 2008 Claimant visited James Derrisaw, M.D. for several evaluations. Dr. Derrisaw noted that Claimant continued to experience pain in his right wrist, his skin was mottled and his right hand was colder than his left hand. Additional testing revealed that Claimant was not suffering from thoracic outlet syndrome. He thus determined that Claimant was experiencing the onset of Chronic Regional Pain Syndrome (CRPS).

21. Claimant also returned to Dr. Reichhardt for medical treatment. Dr. Reichhardt recommended QSART testing to further explore the possible diagnosis of CRPS. Subsequent QSART testing revealed that Claimant had a low probability for CRPS.

22. At the request of Dr. Reichhardt, Claimant underwent a pain psychology evaluation with Ron Carbaugh, Psy.D. Dr. Carbaugh concluded that Claimant's personality

style and chronic pre-existing depression were likely to profoundly impact his pain perception and response to treatment. He noted that Claimant emphasized his psychological symptoms during the assessment. Dr. Carbaugh's diagnosis included the following: (1) Pain Disorder associated with both psychological factors and a general medical condition vs. Factitious Disorder with predominantly physical signs and symptoms; (2) Dysthymic disorder; (3) Probable personality disorder NOS-dependent and avoidant features.

23. Dr. Derrisaw, an expert in anesthesiology and pain medicine, testified through an evidentiary deposition in this matter. He explained that, during an initial assessment, Claimant was suffering from acute pain syndrome due to trauma and the potential onset of CRPS. During subsequent examinations, Claimant exhibited symptoms of CRPS that included right hand pain, coldness, weakness, mottling, edema and a glossy appearance to his skin. He commented that an alternative diagnosis for Claimant's symptoms could be mediated sympathetic pain, but that more diagnostic testing such as an alcohol block and neuromodulation would aid in a diagnosis. He also noted that Claimant could be suffering from vascular spastic disease that is typically caused by a person's genetic predisposition. Dr. Derrisaw concluded that, in addition to the diagnostic tests, there was little treatment that could be given to Claimant. Although he stated that Claimant had not reached MMI, he determined that Claimant was close to MMI.

24. DIME physician Dr. Fillmore, an expert in rehabilitation, physical medicine and pain management, testified through an evidentiary deposition in this matter. Dr. Fillmore stated that Claimant initially reached MMI on March 20, 2007. After receiving information that Claimant began experiencing symptoms of CRPS in approximately December 2007, Dr. Fillmore responded to a question about whether he had an opinion regarding Claimant's MMI status. He commented with the following: "No. That's a - - I don't. You've got to try and find out what works for the patient and what doesn't. If they were out of ideas for him, at some point it's medication management, he's at MMI." Later in the deposition Claimant responded that, based on the new information and without evaluating Claimant, he could not determine whether Claimant was currently at MMI.

25. Dr. Reichhardt, an expert in physical medicine and diagnostics, testified through an evidentiary deposition in this matter. He explained that it is unlikely Claimant suffers from CRPS but that a QSART test was one additional test that could be performed within the Medical Treatment Guidelines to ascertain whether Claimant suffers from CRPS. In fact, a QSART test performed after Dr. Reichhardt's deposition revealed a low probability for CRPS. Dr. Reichhardt opined that, although "some reasonable questions have been raised" about Claimant's condition, his condition since he reached MMI has not worsened. Therefore, Claimant remained at MMI and any additional treatment should be considered medical maintenance.

26. Claimant has failed to produce clear and convincing evidence to establish that it is highly probable that Dr. Fillmore's March 20, 2007 MMI determination was incorrect. At his deposition, Dr. Fillmore was presented with post-MMI medical evidence about Claimant's condition. When asked directly about whether Claimant remained at MMI, he simply could not offer an offer an opinion absent additional evaluation. He did not directly renounce his determination that Claimant had reached MMI on March 20, 2007. Furthermore, Dr. Fillmore's comments at the deposition reflect that, after treatment pro-

viders exhausted options, Claimant would be at MMI and any additional treatment would constitute medical maintenance.

27. The testimony of Dr. Reichhardt supports Dr. Fillmore's comments regarding MMI. Dr. Reichhardt testified that, although it is unlikely that Claimant suffers from CRPS, a QSART test constituted an additional test that could be performed within the Medical Treatment Guidelines in order to ascertain whether Claimant suffered from CRPS. The QSART test performed after Dr. Reichhardt's deposition revealed a low probability for CRPS. Based on the credible testimony of Dr. Reichhardt, Claimant has thus exhausted his options within the Medical Treatment Guidelines. Moreover, Dr. Reichhardt opined that, although "some reasonable questions have been raised" about Claimant's condition, he had not suffered a worsening of condition since he reached MMI. Therefore, Claimant remained at MMI and additional treatment should be considered medical maintenance. In contrast, Dr. Derrisaw's testimony regarding additional diagnostic testing such as an alcohol block and neuromodulation constitutes a difference of medical opinion regarding the extent of appropriate diagnostic testing. Dr. Derrisaw's comments do not constitute unmistakable evidence that Dr. Fillmore's DIME determination regarding MMI was incorrect.

28. Although Claimant remains at MMI, the credible testimony of Dr. Fillmore and Dr. Reichhardt reflects that Claimant is entitled to medical maintenance benefits. Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A worker's compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of

the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME and Medical Benefits

4. As found, Claimant's specific objection to the FAL reflected that he disagreed with the DIME determination. Accordingly, Claimant's hearing applications encompassed a challenge Dr. Fillmore's MMI finding. However, a DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

5. MMI exists when "any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. Furthermore, the "requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of [MMI]." *In Re Brownson-Rausin,* W.C. No. 3-101-431 (ICAP, Oct. 21, 2004).

6. As found, Claimant has failed to produce clear and convincing evidence to establish that it is highly probable that Dr. Fillmore's March 20, 2007 MMI determination was incorrect. At his deposition, Dr. Fillmore was presented with post-MMI medical evidence about Claimant's condition. When asked directly about whether Claimant remained at MMI, he simply could not offer an offer an opinion absent additional evaluation. He did not directly renounce his determination that Claimant had reached MMI on March 20, 2007. Furthermore, Dr. Fillmore's comments at the deposition reflect that, after treatment providers exhausted options, Claimant would be at MMI and any additional treatment would constitute medical maintenance.

7. As found, the testimony of Dr. Reichhardt supports Dr. Fillmore's comments regarding MMI. Dr. Reichhardt testified that, although it is unlikely that Claimant suffers from CRPS, a QSART test constituted an additional test that could be performed within the Medical Treatment Guidelines in order to ascertain

whether Claimant suffered from CRPS. The QSART test performed after Dr. Reichhardt's deposition revealed a low probability for CRPS. Based on the credible testimony of Dr. Reichhardt, Claimant has thus exhausted his options within the Medical Treatment Guidelines. Moreover, Dr. Reichhardt opined that, although "some reasonable questions have been raised" about Claimant's condition, he had not suffered a worsening of condition since he reached MMI. Therefore, Claimant remained at MMI and additional treatment should be considered medical maintenance. In contrast, Dr. Derrisaw's testimony regarding additional diagnostic testing such as an alcohol block and neuromodulation constitutes a difference of medical opinion regarding the extent of appropriate diagnostic testing. Dr. Derrisaw's comments do not constitute unmistakable evidence that Dr. Fillmore's DIME determination regarding MMI was incorrect.

8. Although Claimant remains at MMI, the credible testimony of Dr. Fillmore and Dr. Reichhardt reflects that Claimant is entitled to medical maintenance benefits. To prove entitlement to medical maintenance benefits, a Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment "the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999). As found, Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

Temporary Total Disability Benefits

9. To obtain TTD benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-103(1)(a), C.R.S. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there

are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. TTD benefits are terminated when a claimant reaches MMI. §8-42-105(3)(a), C.R.S. Therefore, because Claimant reached MMI on March 20, 2007 he is not entitled to any TTD benefits subsequent to that date. However, Claimant contends that he is entitled to receive TPD and TTD benefits beginning on January 17, 2007.

11. In contrast, Respondents assert that Claimant is precluded from receiving TTD benefits subsequent to January 17, 2007 because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes"). Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006); *see Anderson,* 102 P.3d at 330. The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994).

12. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant committed a volitional act or exercised some control over his termination. Although Claimant missed parts of several scheduled work shifts between December 26, 2006 and January 16, 2007, many of the absences were caused by medical and physical therapy appointments related to his industrial injury. Small portions of Claimant's absences were related to non-work-related medical conditions or personal matters. Furthermore, because Claimant was generally terminated for excessive absenteeism, it is unclear whether the reasons for the termination included medical appointments that were related to his industrial injury. Finally, although Claimant's shop foreman specified that he discussed tardiness and attendance problems with Claimant on two occasions, there is no evidence that Claimant was apprised that any additional attendance problems would result in termination. Because the primary reasons for Claimant's absences involved his wrist injury, he did not exercise control over his termination under the totality of the circumstances.

Average Weekly Wage

13. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). As found, an AWW of $613.68 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on March 20, 2007.

2. Claimant shall receive medical maintenance benefits that are reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

3. Claimant shall receive TPD and TTD benefits for the period January 17, 2007 until March 20, 2007.

4. Claimant earned an AWW of $613.68.

5. All issues not resolved in this Order are reserved for future determination.

DATED: November 6, 2008.

Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-703-171

ISSUES

The issues include Claimant's seeking to overcome the DIME physician's findings as it relates to the impairment rating; Grover post-MMI medical benefits for the neck and shoulder; and, disfigurement benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury while working for the Respondent-Employer on October 27, 2006, when he slipped and fell and struck the top posterior portion of his scalp.
2. Claimant was treated through the Respondent-Employer's workers' compensation designated physician through CCOM. Dr. Mary Dickson treated claimant at CCOM.
3. On November 6, 2007 Dr. Dickson placed Claimant at maximum medical improvement (MMI). On November 8, 2007 Dr. Dickson provided a combined impairment rating of 26% whole person.
4. Claimant's final diagnoses from Dr. Dickson were a closed-head injury with persistent balance difficulties, with atypical benign positional vertigo of the horizontal canal on the left side; possible central dizziness from head injury; tinnitus and cervical strain. Dr. Dickson noted that Claimant had pre-existing advanced cervical spine degenerative disc disease with degenerative osteophytosis associated with intervertebral neuroforaminal stenosis greatest at the left at C6-C7, and on the right at C7-T1.
5. During the course of Claimant's treatment he was provided with a Neuromonics unit to address the ongoing tinnitus in his left ear. The Neuromonics unit was recommended through a referral by Dr. Shaw.
6. Claimant subsequently underwent a division independent medical examination (DIME) on April 2, 2008 with Dr. Carlos Cebrian. Dr. Cebrian produced his report on April 15, 2008.
7. Dr. Cebrian reviewed Claimant's medical records including diagnostic tests conducted during the course of Claimant's treatment. Dr. Cebrian also conducted a physical examination of the Claimant. Dr. Cebrian agreed with the MMI date of November 6, 2008 but provided an impairment rating of 15% whole person based upon Table I, page 109 of the American Medical Association Guides to the Evaluation of Permanent Impairment Third Edition. Dr. Cebrian opined that this rating encompassed the closed head injury with resultant balance issues concluding that this was the best representation of Claimant's impairment.
8. Dr. Cebrian determined that Claimant's post-MMI care should consist of follow-up visits every six months with Dr. Shaw for as long as he is using the Neuromonics unit.
9. Dr. Timothy Hall saw claimant for an independent medical examination on June 12, 2008. Based upon Dr. Hall's reports and his deposition testimony, Dr. Hall disagrees with the DIME physician's findings and impairment rating. The disagreement with Dr. Cebrian is a difference of medical opinion. The ALJ finds Dr. Cebrian's opinion to be credible and to carry the greater weight.
10. Claimant has a ½ inch to one-inch scar on a portion of the scalp covered with hair that is difficult to see without close inspection.

CONCLUSIONS OF LAW

1. Sections 8-42-107(8)(b)(III) and (c), C.R.S. (2007), provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

2. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

3. The ALJ finds the DIME physician's opinion on the impairment rating to be credible and finds insufficient medical or other evidence to establish by clear and convincing evidence that the DIME physician's opinion was clearly wrong. Claimant has failed to overcome the DIME physician's finding on impairment.

4. Section 8-42-101(1), C.R.S. 2007, requires the employer or insurer to provide medical benefits which are reasonable and necessary to cure and relieve the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, after the claimant reaches maximum medical improvement the claimant may obtain future medical benefits only to maintain maximum medical improvement or to prevent a deterioration of her condition. *See Grover v. Industrial Commission,* 759 P.2d 705, 711 (Colo. 1988). The claimant is therefore entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995)*; Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App. 1992); *Jones v. Estes Express Lines*, W.C. No. 4-651-658 (April 25, 2008).

5. Claimant bears a burden of proving by a preponderance of the evidence that he is entitled to Grover post-MMI medical benefits. Claimant has failed to establish by a preponderance of the evidence that Claimant's current neck and shoulder issues are related to the industrial injury and require post-MMI Treatment. The ALJ finds the DIME physician's opinion to be credible and to carry the greater weight when compared to other medical evidence presented.

6. Based upon the definition found in section 8-42-108, C.R.S. (2006) indicating that disfigurement is serious, permanent disfigurement about the head, face or parts of the body normally exposed to public view, the ALJ finds that Claimant does not have a serious disfigurement of the head and additionally that Claimant's scar is not on a part of

the body normally exposed to public view. Therefore, benefits for disfigurement are denied.

ORDER

It is therefore ordered that:

1. Claimant's claim to overcome the DIME physician on the impairment rating is denied and dismissed.
2. Claimant's claim for Grover post-MMI medical benefits for the neck and shoulder is denied and dismissed.
3. Claimant's claim for disfigurement benefits is denied and dismissed.
4. All matters not determined herein are reserved for future determination.

DATE: November 3, 2008

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-704-417

ISSUES

The issue of apportionment of temporary disability benefits is added to the issues addressed in the Specific Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Findings of Fact made in the Specific Findings of Fact, Conclusions of Law, and Order are incorporated into this Supplemental Order.

CONCLUSIONS OF LAW

The Conclusions of Law made in the Specific Findings of Fact, Conclusions of Law, and Order are incorporated into this Supplemental Order, with the addition of this conclusion:

9. Apportionment of medical benefits and temporary disability benefits is appropriate where the record supports a finding that a claimant's employment with multiple employers caused the need for the present treatment and contributed to the disability. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo.App 2001). Respondents have shown by a preponderance of the evidence that 20% of the need for the treatment and 20% of the disability was caused by Employer. Insurer is liable for 20% of Claimant's temporary disability benefits in this claim.

SUPPLEMENTAL ORDER

It is therefore ordered that:

1. Insurer is liable for 20% of the costs of the February 5, 2007, surgery and related medical costs of recovery. Liability shall not exceed 20% of the amounts established by the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S.
2. Insurer shall pay Claimant permanent partial disability benefits based on an impairment of 11% of the leg at the hip. Section 8-42-107(2)(a), C.R.S. Insurer may credit any previous payments of permanent disability benefits.
3. Insurer shall pay 20% of the temporary disability benefits for the hours Claimant missed as identified in the parties' stipulation.
4. Insurer shall pay Claimant additional compensation for the identified disfigurement in the amount of $1,200.00.
5. Insurer may take an appropriate offset for short-term disability benefits as identified in the parties' stipulation and pursuant to Section 8-42-103(1)(d), C.R.S.
6. All relevant benefit calculations shall be based upon an average weekly wage of $431.43.
7. All matters not determined herein are reserved for future determination.

DATED: *November 5, 2009*

Bruce Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-711-469

ISSUES

The issues raised for consideration at hearing is whether Respondents have overcome the opinion of the Division independent medical examiner (DIME), Dr. Swarsen, and a disfigurement award.

FINDINGS OF FACT

Having considered the evidence and the parties' post hearing position statements, the following Findings of Fact are entered.

1. Claimant worked for the Employer as a route merchandiser at the time of her injury. She sustained an admitted injury to her elbow as a result of a slip and fall on January 5, 2007.

2. Claimant did not immediately seek medical attention because she believed the injury was simply bruising and soreness. When her symptoms did not resolve, Claimant sought medical treatment at Penrose St. Francis Emergency Room on January 7, 2007.

3. Claimant reported to the Emergency Room physicians that she had injured her right elbow and right hip. Claimant did not complain of any right shoulder symptoms. X-rays taken of Claimant's right elbow showed no evidence of a discrete fracture or dislocation. There did appear to be a small joint effusion.

4. Claimant subsequently received treatment from EmergiCare. On January 11, 2007, Dr. Schalin noted that Claimant denied any prior injuries to her right wrist or elbow. Dr. Schalin assessed Claimant with right elbow contusion and mild right hip contusion.

5. On February 9, 2007, Claimant was seen by Dr. Baptist at EmergiCare. Claimant told Dr. Baptist that her wrist was much better and she only had minimal pain in her wrist; however, Claimant said that she had ongoing pain in her elbow. Dr. Baptist noted full range of motion in Claimant's right wrist and referred her to see Dr. Ciccone for her right elbow. Dr. Ciccone is a board certified orthopedic surgeon.

6. Claimant was first seen by Dr. Ciccone on February 27, 2007. Dr. Ciccone noted that Claimant had full range of motion in her right shoulder. Dr. Ciccone recommended a MRI of Claimant's right elbow.

7. Claimant had a MRI taken of her right elbow on March 30, 2007. The MRI showed a probable partial tear of the deep insertion of the triceps tendon. It was noted that no complete rupture was seen and the tear was likely a subacute injury, consistent with the time of injury. The MRI also showed a strain injury of the common extensor tendon bundle with sprain of the lateral ulnar collateral ligament. The MRI also showed a small tear of the anconeus upper trocar area muscle with nerve edema and possible neuritis.

8. On April 3, 2007, Dr. Ciccone reviewed Claimant's MRI and diagnosed her with right elbow pain with triceps tear and possible cubital tunnel syndrome.

9. On May 9, 2007, Dr. Ciccone performed a right triceps tendon repair on Claimant. Pre-operation examination noted that Claimant had "no obvious muscular atrophy on full range of motion of the right shoulder."

10. Following surgery, Claimant underwent physical therapy for her elbow beginning June 1, 2007. Claimant continued to undergo physical therapy with no complaints of right shoulder pain or symptoms until October 30, 2007.

11. On September 18, 2007, Dr. Ciccone noted that Claimant was doing well but still had some pain and was somewhat restricted in her activities. Claimant did not complain to Dr. Ciccone of any right shoulder symptoms.

12. On October 12, 2007, Claimant was seen at Concentra by Dr. Darrel Quick, an authorized treating physician. Dr. Quick noted that Claimant said her right hip was

"okay." After examining Claimant, Dr. Quick noted localized tenderness over the distal right triceps tendon in the area of surgical repair with slight atrophy of the right triceps muscle and slight weakness of the right elbow extension, which may prohibit performance of essential job functions. Dr. Quick recommended continued physical therapy. Dr. Quick did not note any problems or symptoms with Claimant's shoulder.

13. Claimant was placed at maximum medical improvement and discharged from care by Dr. Ciccone on October 23, 2007. Dr. Ciccone recommended an in-home exercise program for future medical treatment. Dr. Ciccone, a orthopedic surgeon, did not note any problems or symptoms with Claimant's shoulder.

14. On October 30, 2007, physical therapy records note right shoulder symptoms for the first time.

15. Claimant testified that she told all providers about her shoulder symptoms. This testimony was not deemed persuasive or credible. The ALJ finds that the medical records do not support this contention by Claimant.

16. Mr. Quick placed Claimant at maximum medical improvement (MMI) on December 3, 2007. Dr. Quick assessed Claimant with 4% right upper extremity impairment for her right elbow. Dr. Quick did not assign any impairment for Claimant's shoulder. Dr. Quick did not recommend any future medical care. Respondents filed a final admission of liability consistent with Dr. Quick's opinion.

17. Claimant was evaluated by Dr. Swarsen for a DIME on May 8, 2008. Claimant told Dr. Swarsen that her right shoulder pain did not start until July or August 2007 and that prior to that time she was wearing a sling. However, the ALJ finds and concludes that the medical records to show that Claimant did not report shoulder pain until October 30, 2007 despite being in physical therapy beginning June 1, 2007. The ALJ further finds and concludes the records to reflect that Claimant's arm was only immobile and in a sling for a period of three weeks post-surgery.

18. Dr. Swarsen opined that Claimant injured her shoulder when she fell but that it was not producing any significant symptoms until after she was immobile post-surgery to her elbow. Dr. Swarsen further opined that Claimant may have some element of adhesive capsulitis.

19. Dr. Swarsen opined that Claimant was not yet at MMI. Dr. Swarsen assessed Claimant with 16% right upper extremity impairment consisting of 13% for her right shoulder and 4% for her right elbow.

20. Claimant was evaluated by Dr. Watson for an IME on August 7, 2008. Dr. Watson reviewed the medical records and noted that Claimant's shoulder symptoms did not appear until October 30, 2007, approximately 10 months post-injury and over 5 months post-surgery. After evaluating Claimant and reviewing Claimant's medical records, Dr. Watson opined that Claimant reached MMI as of December 3, 2007 as determined by

Dr. Quick. Dr. Watson's testified that Dr. Quick correctly determined Claimant's impairment rating and MMI date.

21. Dr. Watson also credibly opined that it was not medically plausible for Claimant's right shoulder impingement to be due to a loss of motion post-operatively. The medical records show that Claimant did not have any atrophy of her right shoulder when she was examined on February 27, 2007, May 9, 2007, and August 7, 2008. At the hearing, Dr. Watson testified that if Claimant's shoulder had been immobile for an extended period of time, she would have had some atrophy and the medical records are not consistent with Claimant's statements.

22. Dr. Watson also testified that Claimant's physical therapy records show that her arm was not immobile up until October 30, 2007 and that if Claimant had developed adhesive capsulitis it would have caused her problems when she began physical therapy on June 1, 2007.

23. Dr. Watson testified that he did not have a mere difference of opinion with Dr. Swarsen. Dr. Watson testified that Dr. Swarsen was wrong because his findings were not consistent with the medical records and Dr. Swarsen did not follow the *AMA Guides, 3rd Ed. Revised* (*AMA Guides*) when issuing his opinion. Dr. Watson opined that Dr. Swarsen did not follow the *AMA Guides* because he did not adequately resolve the disparities between his findings and that of Dr. Quick as required by the *AMA Guides*. Based on the totality of the evidence, the ALJ finds and concludes that Dr. Swarsen did not act consistent with the requirements of the *AMA Guides* in performing his evaluation. The ALJ concludes that the totality of the evidence supports the finding and Dr. Swarsen's opinion is incorrect and has been overcome.

24. Dr. Watson opined that the claimant's current shoulder symptoms are due to degeneration and not from her work injury. He also opined that Dr. Quick's opinions were correct. The ALJ has considered the totality of the evidence, and finds the opinions of Drs. Watson and Quick to be credible and persuasive. The ALJ has considered all evidence to the contrary to the opinions of Dr. Watson and Dr. Quick regarding MMI, causation and impairment, and finds these opinions and evidence to be unpersuasive.

25. As a result of a work-related injury, Claimant incurred disfigurement of a three-inch surgical scar to the right elbow. The disfigurement is serious, permanent and normally exposed to public view, and entitles Claimant to $300.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers without the necessity of litigation. Section 8-42-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See, *Magnetic Engineering v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

4. In this case, Respondents seek to overcome the opinion of the DIME physician, Dr. Swarsen. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the finding of a DIME physician with regard to the impairment rating and MMI determination (rating/IME) shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME (rating/MMI) must produce evidence showing it highly probable the DIME (rating/MMI) is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro, supra.*

5. Based on the totality of the evidence presented at hearing, Respondents established by clear and convincing evidence that the determination of the DIME physician with regard to MMI and impairment is most probably incorrect. Dr. Watson and Dr. Quick's' opinions on MMI and impairment rating were found to be more credible and persuasive than the opinion of Dr. Swarsen. Furthermore, Dr. Swarsen did not follow the *AMA Guides* because he did not adequately resolve the disparities between his findings and that of Dr. Quick as required by the *AMA Guides*.

6. It is concluded that Claimant reached MMI on December 3, 2007 and she has a 4% right upper extremity impairment rating.

7. As a result of a work-related injury, Claimant incurred disfigurement of a three-inch surgical scar to the right elbow. The disfigurement is serious, permanent and normally exposed to public view, and entitles Claimant to $300.

ORDER

It is therefore ordered that:

1. Respondents shall pay permanent partial disability benefits on the basis of a 4% right upper extremity impairment rating and a MMI date of December 3, 2007.
2. Respondents shall be liable for a disfigurement award in the amount of $300.
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

DATED: November 24, 2008

Margot W. Jones

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
W.C. No. 4-712-019

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ISSUES

The issues to be determined by this decision concern: (1) Claimant's "Verified Motion to Recuse;" (2) whether or not Claimant was appropriately denied her request to take the deposition of a Division of Workers' Compensation (DOWC) official, Kathryn Mueller, M.D., the administrator of the DOWC Division Independent Medical Examination (DIME) Program; (3) whether the Claimant, by her actions and inactions, waived her right to a DIME; (4) whether or not the Claimant set issues for hearing that were not ripe, thus, entitling Respondent to reasonable attorney fees; and, if so, (5) what are Respondent's reasonable attorney fees?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Recusal

1. At the commencement of the hearing, Claimant filed a "Verified Motion to Recuse," alleging, *inter alia*: (1) "…such overt hatred of the undersigned [Claimant's attorney] was particularly evident at the telephonic pre-hearing conference [status conference] in this matter two days ago in which said ALJ perfunctorily, otherwise inexplicably, and improperly and unlawfully denied the Claimant the right to present evidence in support of the issues duly endorsed by her present Application for Hearing…by accordingly denying Claimant the right to depose either or both Katherine (*sic*) Mueller or the head of the [D] IME section…; (2) the ALJ has "consistently" ruled against Claimant's attorney regardless of the law and the facts in a criminal and political manner to "steal thousands of dollars in fraudulently claimed attorney's fees from said Mexicano's worker's compensation client and because the ALJ "detests, and has always detested the undersigned counsel [Claimant's counsel]; (3) and, several other conclusory allegations which are devoid of underlying factual allegations leading a reasonable person to form the conclusions formed by Affiant Claimant's counsel. The ALJ accepts the allegations of the "Verified Motion" as facially true for purposes of ruling on Claimant's recusal motion. As concluded below and ordered, the "Verified Motion to recuse" is denied at this juncture because all proceedings must halt until there has been a ruling on a recusal request.

2. In the "Verified Motion," Claimant alleges that the ALJ herein has improperly ruled against his clients on numerous previous occasions.). The "Verified Motion" does not allege that any of these prior rulings, against the clients of Claimant's attorney herein, have been reversed by a higher tribunal.

3. Claimant alleged that the ALJ is biased because during a status conference the ALJ denied Claimant's untimely request to subpoena Dr. Mueller or alternatively depose her. Claimant alleges that the ALJ stated "you're not going to get them. This is your hearing on that and I am denying it." Even if true, these allegations are insufficient to facially establish bias or lack of partiality.

4. Claimant's attorney herein has created negative allegations, *e.g.,* the judge "hates" him, and used these allegations as a basis for recusal.

Procedural Matters

5. In his position statement, Claimant requests the ALJ to take judicial notice of "computer entries and Office of Administrative Courts and Division Of Workers Compensation and its I.M.E. Unit's files in consideration of this matter pursuant to CRE 201." The ALJ declines Claimant's request. An evidentiary hearing was held in this matter on September 18, 2008 and Claimant declined to present any witnesses and produced only documents in her case in chief. Respondent presented its case in chief through documents and though the stipulated testimony of Polyakovics. At no time during the hearing did Claimant request the ALJ take judicial notice of any of these files. Further, Claimant failed to

present these files to the ALJ at the hearing and therefore Claimant has not complied with CRE 201(d). Claimant also has not complied with Workers' Compensation Rules of procedure (WCRP), Rule 9-4, because Claimant did not seek to have these records certified and did not seek to introduce them into evidence. This request of Claimant's is frivolous and groundless.

6. At a Status Conference on September 16, 2008, held after 1:00 PM, Claimant's attorney stated he intended to present the testimony of Kathryn Mueller, M.D., the Medical Director of the Division of Workers' Compensation (DOWC). Claimant's attorney admitted he had not subpoenaed Dr. Mueller and it was less than 48 hours to the hearing. See C.R.C.P. 45(c). [subpoenas must be served no later than 48 hours prior to trial]. Claimant has never produced a subpoena served on Dr. Mueller for the hearing nor does Claimant allege that one exists.

7. At the status conference, Claimant requested a deposition of Dr. Mueller. This request was denied. A status conference is not the appropriate place for a motion to depose a witness. From the date of his Application for Hearing in April 2008 until the Status Conference of September 16, 2008, the Claimant made no attempt to depose Dr. Mueller. In any event, WCRP 9-1(B)(2) states "Depositions of other witnesses may be taken upon written motion, order, and written notice to all parties." Claimant did not make a written motion to depose Dr. Mueller prior to or at the hearing.

8. Further, DOWC Rule 9-4, statesthat "absent extraordinary circumstances, no employee of the DOWC should be expected or required to testify at a hearing." Section 8-43-210 also states that a deposition may be submitted as evidence upon a showing of "good cause." Claimant has not presented the ALJ with any extraordinary circumstances. Claimant has not shown any good cause for deposition, and Claimant made no reasonable attempt to obtain Dr. Mueller's deposition prior to hearing.

9. Furthermore, Dr. Mueller's proposed testimony would only be relevant to the issue of the "propriety of the DIME," which Claimant is precluded from raising herein because ALJ Harr already decided the issue and concluded the Office of Administrative Courts did not have jurisdiction.

10. Claimant did not request a continuance of the hearing. Dr. Mueller was not under subpoena for the hearing. At the hearing itself, Claimant did not request a post hearing deposition of Dr. Mueller nor did Claimant make any showing of good cause for the deposition of Dr. Mueller and Claimant did not even raise the argument. To the extent that Claimant's position statement is a request for a post hearing deposition, it is denied for all the reasons outlined above.

The DIME

11. The Claimant sustained a work related injury on December 3, 2006. The Respondent referred Claimant to Dr. Johnson for medical care. On May 29, 2007, Dr. Johnson placed the Claimant at maximum medical improvement (MMI) with no impairment. Respondent filed a Final Admission of Liability on June 11, 2007, consistent with Dr. Johnson's report.

12. Claimant filed a Notice and Proposal for DIME on June 21, 2007. After negotiations for a physician failed, the Claimant filed an Application for a DIME on July 27, 2007.

13. The DOWC selected Brian Reiss, M.D., as the DIME physician on August 27, 2007.

14. Claimant did not schedule an examination with Dr. Reiss. From August 27, 2007 to the present, Claimant has undertaken no steps to schedule the DIME with Dr. Reiss. Claimant is presumed to know the Workers' Compensation rule concerning the scheduling of a DIME, and the ALJ infers and finds that despite this knowledge, Claimant did not timely schedule a DIME.

15. Claimant filed an Application for Hearing concerning the propriety of the DIME selection process. ALJ Mike Harr found Claimant's arguments concerning the DIME process frivolous. ALJ Harr stated "the judge finds the issue raised in her Application for Hearing to be frivolous and groundless." The Industrial Claim Appeals Office (ICAO) indirectly affirmed this finding in determining that although the issue was "frivolous," the award of attorney fees by ALJ Harr was reversed because the issue was "ripe," and ALJ Harr had jurisdiction to determine the issue. Claimant has not pursued any legal proceedings to challenge the DIME selection process or the DOWC's Selection of Dr. Reiss.

Waiver

16. After ALJ Harr found the Claimant's challenge to the DIME process "frivolous and groundless," the Claimant has failed to schedule the DIME examination. In addition, after ALJ Harr's order, Respondent reminded the Claimant of her obligation to schedule the DIME and she still has failed to schedule the DIME.

17. According to Suzanne Polyakovics, Claims Administrator for the Employer, the Claimant has never scheduled the DIME, and Polyakovics has never received notice of a DIME from the DOWC, the Claimant or from Dr. Reiss.

18. Claimant's inaction reflects her intent to relinquish her right to the DIME. Knowing that the Rule required her to schedule the DIME examination within five business days, the Claimant has failed to schedule the examination at all, up to and including the present time. She has intentionally failed to schedule the examination despite the fact that on March 6, 2008 ALJ Harr found her argu-

ments to be frivolous and groundless. She has failed to schedule the examination after being reminded to do so by the Respondent. She has failed to take any action to schedule the DIME for over a year. The totality of the evidence demonstrates Claimant's intent to abandon the DIME.

19. The Claimant had until September 4, 2007 to schedule the DIME. She failed to schedule the DIME for more than one year. Her conduct demonstrates that she knew of the selection of the DIME Examiner on August 27, 2007 and knew that she should have scheduled the examination within five business days or by September 4, 2007. Over the past year, she has failed to take any action to set the DIME with Dr. Reiss.

20. Setting the matter for hearing concerning the propriety of the DIME does not show Claimant's intent to pursue a DIME while challenging the specific process. This contention is inconsistent with the totality of the evidence because the designated issue in Claimant's Application for Hearing was previously determined to be frivolous and groundless and not a bona fide dispute over the DIME process. ALJ Harr previously concluded that Claimant's Application for Hearing was frivolous and groundless. ICAO affirmed this decision. Claimant failed to raise any legitimate challenge to the DIME, and her prior Hearing Application does not reflect an intention to maintain the DIME process.

Issue Preclusion

21. Claimant filed an Application for Hearing on August 13, 2007 concerning the "propriety of the Division IME." ALJ Harr conducted a hearing on that Application and issued a decision. His decision directly addressed Claimant's issue of the "propriety of the division IME." Respondent appealed that decision on March 14, 2008. While the decision was under appeal and before the ICAO issued a ruling, the Claimant filed the current Application for Hearing (on April 30, 2008), endorsing the exact same issues, *i.e.,* "propriety of the DIME process." The ALJ infers and finds that this issue was not ripe for determination on September 18, 2008 because the exact issue had previously been determined to be "frivolous and groundless."

Attorney Fees

22. Claimant filed a petition to review ALJ Harr's decision was on March 14, 2008. At the time the Claimant filed the Application for Hearing herein on April 30, 2008, the issues were subject to an appeal and the Application for Hearing was not "ripe" at the time it was filed.

23. Counsel for Respondent filed a sworn affidavit setting forth a breakdown of time, attorney fees and costs. Depending on the activity involved, Attorney Thomas billed the respondent either $75 an hour or $145 an hour, in the aggregate fee amount of $2,506, for over 100 hours of legal work to defend the

issues at the September 18 hearing. Considering the fact that Attorney Thomas has practiced law for 15 years, specializing in workers' compensation matters, the ALJ finds the hourly rates inherently fair and reasonable. Considering the complexity of the issue Respondent was required to defend, coupled with the fact that Respondent correctly argues that the exact issue had been defended, argued and decided before, the ALJ finds the 100 plus hours excessive and the ALJ infers and finds that 5o hours plus is more reasonable for aggregate attorney fees of $1,253 to defend the issues at the September 18 hearing. Respondent incurred costs of $83.85. The ALJ finds that Respondent incurred reasonably assessed attorney fees and costs of $1,338.85.

Ultimate Findings

24. Claimant has failed to prove, by a preponderance of the evidence that the DIME process was improper. Respondent has proven, by a preponderance of the evidence that the same issue Claimant designated for the September 18, 2008 hearing was adjudicated by ALJ Harr insofar as the claimed issue was determined to be "frivolous and groundless," and ICAO affirmed this adjudication, thus, the issue was not ripe for adjudication at the September 18, 2008 hearing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Recusal

1. Disqualification (recusal) is governed by Rule 97, C.R.C.P. The factual allegations upon which conclusions or inferences are based must be accepted as facially true in ruling on a motion to recuse. *See Wright v. District Court*, 731 P. 2d 661 (Colo. 1987). As found, the factual allegations in Claimant's "Verified Motion to Recuse" were accepted as facially true.

2. An affidavit alleging facts, not opinions or conclusions, supporting a reasonable inference of actual or apparent bias, is required for recusal. *Prefer v. PharmNetRx*, 18 P. 3d 844 (Colo. App. 2000), *cert. dismissed*, 2000. Mere conclusions or opinions, alleged in an affidavit in support of recusal, are insufficient to warrant recusal. *People v. Cook*, 22 P. 3d 947 (Colo. App. 2000). As found, Claimant's "Verified Motion" alleges conclusions and/or opinions, but no underlying evidentiary facts supporting a reasonable inference of actual or apparent bias. If there is a reasonable question concerning the judge's impartiality, recusal is required. *Wood Bros. Homes v. City of Fort Collins*, 670 P. 2d 9 (Colo. App. 1983). As found, Claimant's allegations do not raise a reasonable question concerning the ALJ's impartiality. An attorney cannot simply hurl out scandalous, conclusory accusations concerning a judge and then allege that the judge

would necessarily have to be biased and lack partiality because of those allegations initiated by the attorney seeking to disqualify the judge.

3. The most clearly articulated test for recusal is whether a reasonable person, knowing all the relevant facts, harbors doubts about a judge's impartiality. *Switzer v. Berry*, 198 F. 3d 1255 (10th Cir. 2000). As found, a review of the bedrock factual allegations in the Verified Motion to Recuse herein would not cause a reasonable person to harbor doubts about this ALJ's impartiality.

4. In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the judge has a duty of presideing over the case. *Blades v. DaFoe,* 666 P.2d 1126 (Colo. App. 1983), *rev'd on other grounds* 704 P.2d 317 (Colo. 1985). As found and concluded, there is no valid reason for disqualiufication of the ALJ herein.

5. The fact that a movant for a jhudge's disqualification has appeared before a judge in other matters is insufficient for disqualification of the judge as a matter of law. *People v. Johnson,* 634 P.2d 407 (Colo. 1981). This principle holds true even when the judge has made numerous erroneous prior rulings. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.,* 745 P.2d 1034 (Colo. App. 1987). As found, the "Verified Motion" does not even allege that any of the prior rulings against the clients of Claimant's attorney herein have been reversed by a higher tribunal.

6. A judge's opinion formed against a party from evcidence before the court in a judicial proceeding, including an opinion on guilt or innocence, is generally not a basis for disqualification. *People ex rel. S.G.,* 91 p.3d 443 (Colo. App. 2004). The "Verified Motion" alleges "hatred" and implies that the ALJ has adverse opinions concerning Claimant's counsel, based on previous cases before the ALJ. The ALJ concludes that these allegations, accepted as facially true, do not form the basis of a recusal.

7. The Supreme Court determined that to allow a litigant to file a letter critical of a trial judge or to inform the judge of the filing of a complaint with the judicial qualifications commission and later assert the judge's knowledge of the complaint as a basis for disqualification would encourage impermissible judge shopping. *In re Mann,* 655 P.2d 814 (Colo. 1982). Quite simply, an attorney cannot create a negative factual composite of a judge and later use this as the basis for recusal. As found, Claimant's attorney herein has created negative allegations, *e.g.,* the judge "hates" him, and used these allegations as a basis for recusal.

<u>Waiver of the DIME</u>

8. The Doctrine of Waiver applies to workers' compensation proceedings. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). Waiver is the intentional relinquishment of a known right and may be implied when a party engages in conduct that manifests an intent to relinquish the right or acts inconsistently with its assertion. *Tripp v. Parga*, 847 P.2d 165, 167 (Colo. App. 1992). Waiver may be implied by conduct where the party acts inconsistently with a known right. *See Tripp* at 167. It is a factual

question for an ALJ to determine whether a claimant's conduct shows an intent to abandon her right to a DIME. As found, the Claimant's conduct and inaction established Claimant's intent to abandon the DIME.

9. In workers' compensation, courts have recognized that a claimant, through conduct, may waive the right to workers' compensation benefits. For example, in *Hanna v. Print Expediters, Inc.* 77 P.3d 863 (Colo. App. 2003), the Court of Appeals determined that a claimant, by failing to seek future medical care at a hearing on permanent partial disability waived her right to those future medical benefits. *See also Winters v. The Industrial Commission,* 736 P.2d 1256 (Colo. App. 1986) [claimant waived right to vocational rehabilitation by failing to cooperate with the vocational rehabilitation counselor); *Walton v. The Industrial Commission*, 738 P.2d. 66 (Colo. App. 1987) (claimant waived right to vocational rehabilitation and temporary disability benefits by failing to set the issue for hearing). As found, Claimant's inaction to pursue the DIME process for approximately one year amounted to a waiver of the DIME process through conduct (inaction).

10. The Industrial Claim Appeals Office (ICAO) has concluded that a party may waive its right to a DIME by an "unconscionable delay." *Gaither v. Resource Exchange,* W.C. No. 4-125-439 (ICAO, 1994) In *Gaither,* the ALJ found respondents waived their right to a DIME because they failed to take any action for sixty days to prosecute the DIME. The ALJ found a mere sixty days to be an "unconscionable delay" that manifested the respondents' intent to abandon the DIME process. As found, the delay in the present case was approximately one year. The ALJ concludes that this was a waiver of the right to a DIME.

11. Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 64 Colo. 218, 193 P. 493 (Colo. 1920)*; Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). The presumption aids a party in meeting its burden of proof. *Union Ins. Co. v. RCA Corp.,* 724 P.2d 80 (Colo. App. 1986). Further, a party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. NO .4-531-613 (ICAO, January 24, 2005). Under Workers' Compensation Rule 11-2(H), a claimant has five business days to "schedule the examination." As found, the Claimant had until September 4, 2007 to schedule the examination. Claimant waived her right to a DIME by failing to schedule the examination for more than one year. Claimant's conduct demonstrates that she knew of the selection of the DIME Examiner on August 27, 2007 and knew that she should have scheduled the examination within five business days or by September 4, 2007. Over the past year, the Claimant has failed to take any action to set the DIME with Dr. Reiss. By intentionally failing to set the DIME, the Claimant has waived her right to it. As found, setting the matter for hearing concerning the propriety of the DIME did not show Claimant's intent to pursue a DIME. The ALJ rejected this contention because Claimant's Application for Hearing was frivolous and groundless and not a bona fide dispute over the DIME process. ALJ Harr previously concluded that Claimant's Application for Hearing was frivolous and groundless. ICAO affirmed this ision. Because Claimant failed to raise any legitimate challenge to the DIME in her

present Application for Hearing, and in her prior Hearing Application, she had no intent to maintain the DIME process. Also, as found, because she failed to comply with the DOWC Rule for scheduling a DIME, and because she failed to take any action to schedule the DIME for more than one year, and because she failed to bring a bona fide challenge to the propriety of the DIME, her conduct demonstrates her intent to waive her right to the DIME process.

Issue Preclusion

12. Collateral estoppel, or issue preclusion, bars re-litigation of an issue that was actually litigated and decided in a prior proceeding. *Bebo Const. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78, 84 (Colo.1999). Issue preclusion applies to workers compensation proceeding. *Sunny Acres Villa v. Cooper*, 25 P.3d 44 (Colo. 2001). Issue preclusion applies when: 1.) the issue precluded is identical to the issue actually determined in the prior proceeding; 2.) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; 3.) there is a final judgment on the merits in the prior proceeding; and 4.) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo* at 84-85. As found, Claimant presented the identical issue to ALJ Harr and it became final when affirmed on appeal by the ICAO. The Panel noted "the claimant filed an application for hearing regarding the propriety of the DIME panel selection and physician specialties." This is the same issue Claimant raised in the present Application for Hearing, the parties are the same, there is a final decision on the merits and Claimant had a full and fair opportunity to litigate the issue before ALJ Harr. Therefore, Claimant is barred from raising the issues at the present time.

Attorney Fees

13. Section 8-43-211(d), C.R.S. (2008), provides for attorney fees: "If any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person sh*all* be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing." This statute requires an ALJ to determine whether the issues were ripe "at the time the application for hearing" is filed. Later events have no impact on the analysis. Therefore, this ALJ must determine whether the issue of the "propriety of the Division IME" was ripe when claimant filed the application for hearing on April 30, 2008.

14. The ALJ concludes the issue of "propriety of DIME" was not ripe because it had been previously decided by another ALJ and was under appeal. Section 8-43-301(12) C.R.S. (2008) prohibits an ALJ from determining an issue that is under appeal. That statute states: "If a petition to review is filed, a hearing may be held and orders on any other issue during the pendency of the appeal." The ICAO has held that an issue is not "ripe" for adjudication" if a current appeal is pending. *See, Silence v. Carpet Clearance Warehouse*, W.C.4-172-786 (ICAO, March 10, 1995) [issues under appeal "were not ripe for adjudication" at subsequent hearing until appeal ended]. As found, a petition to review was filed March 14, 2008. At the time Claimant filed the Application for Hearing

on April 30, 2008, the issues were subject to an appeal and the Application for Hearing was not "ripe." Therefore, Respondent is entitled to attorney fees.

15. As found, Counsel for Respondent filed a sworn affidavit setting forth a break-down of time, attorney fees and costs. Depending on the activity involved, Attorney Thomas billed the respondent either $75 an hour or $145 an hour, in the aggregate fee amount of $2,506, for over 100 hours of legal work to defend the issues at the September 18 hearing. Considering the fact that Attorney Thomas has practiced law for 15 years, specializing in workers' compensation matters, the ALJ finds the hourly rates inherently fair and reasonable. Considering the complexity of the issue Respondent was required to defend, coupled with the fact that Respondent correctly argues that the exact issue had been defended, argued and decided before, the ALJ finds the 100 plus hours excessive and the ALJ infers and finds that 5o hours plus is more reasonable for aggregate attorney fees of $1,253 to defend the issues at the September 18 hearing. Respondent incurred costs of $83.85. The ALJ finds that Respondent incurred reasonably assessed attorney fees and costs of $1,338.85.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's Verified Motion to Recuse is hereby denied and dismissed.

B. Claimant, through inaction, has waived her right to pursue a Division Independent Medical Examination.

C. The issue concerning the "propriety of the Division Independent Medical Examination" is precluded from being re-litigated by virtue of the doctrine of "issue preclusion."

D. The Claimant shall pay and reimburse the Respondent $1,338.85 for its attorney fees and costs, incurred in defending the "propriety of the Division Independent Medical Examination" a second time for the hearing of September 18, 2008.

E. Claimant is granted a stay of 20 days within which to pay the attorney fees and costs. In the event Claimant timely files a timely Petition to Review, payment for the attorney fees and costs shall be stayed while the appeal is pending.

F. Any and all issues not determined herein are reserved for future decision.

_____day of November 2008.

EDWIN L. FELTER, JR.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-717-199

ISSUES

The issues for determination are disfigurement and permanent partial disability benefits.

FINDINGS OF FACT

1. Claimant injured her right shoulder in this claim on May 10, 2006. Claimant had a previous injury to her shoulders. In April 2000, she received a rating for her previous right shoulder condition of 20% of the right upper extremity or 12% of the whole person.
2. Claimant had a distal clavical resection on her right shoulder in November 2007. Claimant did well, and was released at MMI on March 25, 2008.
3. At MMI, Claimant's range of motion of the right shoulder was better than it had been when it was rated in 2000. Dr. Marc Steinmetz rated Claimant's impairment for this May 2006 injury. The rating was 10% of the right upper extremity for the resection of the distal clavical.
4. The clavical is part of the shoulder. It is not part of the arm.
5. Insurer filed a Final Admission of Liability admitted for an impairment of ten percent of the upper extremity.
6. Ten percent of the upper extremity converts to six percent of the whole person (Table 3, page 16, of the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment").
7. As a result of this injury, Claimant has four noticeable dark marks on her right shoulder.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that, as a result of this compensable injury, she sustained an impairment of 10% of the right upper extremity for the distal clavical resection that she underwent. The clavical is part of the shoulder, not the arm. The situs of her impairment is the shoulder. The impairment does not appear on the schedule of impairments. Section 8-42-107(2)(a), C.R.S. Claimant's impairment is 6% of the whole person. Insurer is liable for permanent partial disability based on an impairment of 6% of the whole person. Sections 8-42-107(8)(c) & (d), C.R.S.

Claimant has sustained disfigurement to her right shoulder, an area of her body normally exposed to public view. Section 8-42-108, C.R.S. Insurer is liable for additional compensation for that disfigurement in the amount of $1,200.00

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent partial disability benefits based on an impairment of 6% of the whole person. Insurer may credit any amounts previously paid for permanent partial disability. Insurer shall pay Claimant interest at the rate of eight percent per annum on any benefits not paid when due.
2. Insurer shall pay Claimant additional compensation for disfigurement in the amount of $1,200.00.

DATED: *November 6, 2008*

Bruce Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-719-618

ISSUES

Did Claimant establish by a preponderance of the evidence that she sustained an occupational disease involving her neck/cervical pathology while employed by the Respondent-Employer?

FINDINGS OF FACT

1. Claimant is currently a 61-year-old female food service worker hired by Respondent in 1989, to work in food service. She began as a lunchroom monitor, and then began working in the kitchen. She worked at two elementary schools, and later began working in the central kitchen at the High School. Claimant is not alleging any specific traumatic injury. Instead, Claimant is alleging an occupational disease with the last injurious exposure prior to neck surgery on December 11, 2006. Claimant could not pinpoint any one-day when her neck symptoms started.

2. While at the high school, most of Claimant's time was spent in the baking area. She made rolls, cakes, brownies and cornbread. Occasionally she would also help in the main kitchen.

3. Claimant transferred from the high school to a Middle School in August 2005. At the Middle School, Claimant made sandwiches and the food items specified on the day's menu. She also performed the duties listed in the job description for "snack bar server." She would also sit at a computer and serve as a cashier during the lunch hour. This job was usually slightly easier than the job in the central kitchen at the high school.

4. Claimant's job duties at the middle school included stocking the drink cooler. Claimant does not know how much a case of drinks weighs. She would use a cart to move the drinks from the cooler in the kitchen to a smaller cooler in the front. She

would also operate the dishwasher to wash cooking dishes and utensils. The students eat from disposable dishes, which were thrown away rather than washed.

5. Claimant's family physician has been Melissa Devalon, M.D. since 1994. Dr. Devalon's nurse practitioner is Karen Migliaccio.

6. There is no medically-documented complaint of neck pain before 2005. However, Dr. Devalon's records show that Claimant had been complaining of low back pain for several years. Dr. Devalon referred Claimant to Steven Waskow, M.D. in 2003, who ordered a low back MRI, which showed degenerative facet arthritis at L5-S1.

7. Claimant's first medically-documented complaint of neck pain occurred on October 20, 2005, when Claimant saw Ms. Migliaccio and gave the following history: "Approximately a week and a half ago she awoke in the morning feeling like she pinched her neck while she was sleeping. She has had some discomfort over the left neck and shoulder region and achiness in her arm."

8. Dr. Devalon referred Claimant for physical therapy and then for epidural steroid injections with Mark Meyer, M.D. Dr. Meyer then referred Claimant to Roger Sung, M.D. Claimant began treating with Dr. Sung on her own.

9. Claimant first saw Dr. Sung on May 25, 2006. She completed intake forms in which she stated that her primary complaint was neck pain and numbness of the left arm, with a 6-7 month duration of symptoms. She treated with Dr. Sung for approximately six months before Dr. Sung performed surgery.

10. On December 12, 2006, Dr. Sung performed surgery, consisting of a three-level cervical diskectomy and arthrodesis with hardware at C3-C6. His pre- and post-operative diagnoses were: C3 through C6 herniated nucleus pulposis with degenerative joint disease.

11. Dr. Sung has not given a causation opinion.

12. The surgery occurred before Claimant filed this workers compensation claim. Claimant did not seek preauthorization of the surgery through workers compensation or the Respondent-Employer.

13. Claimant returned to work for approximately three weeks in early 2007. When asked how her symptoms were at that time, Claimant testified, "The same as before; nothing had changed. Still painful; still taking too much Ibuprofen." She then stopped working.

14. On April 9, 2007, Claimant, through her attorney, completed a First Report of Injury alleging a date of injury of December 11, 2006. In the "Date Employer Notified" blank, Claimant indicated "04/09/2007."

15. Claimant did not tell anyone at the Respondent-Employer that she thought she was being hurt at work until April 2007.

16. The only medical evidence Claimant has supporting compensability is the opinion of Claimant's family physician, Melissa Devalon, M.D. Dr. Devalon issued her only report regarding causation on October 5, 2007. That opinion states "there is likely an association between her activity at work and the pain that she was having in her neck. There clearly was a relationship between her return to duty at work and an aggravation of her underlying pain."

17. Dr. Devalon's specialty is family medicine. She has never been Level II accredited by the Colorado Division of Workers Compensation. At one time, she was Level 1 accredited, but she "let it go" approximately four years ago. Her residency included two months of training in orthopedics. Since then, she has attended continuing education seminars, which may include some component of orthopedics. The last seminar she attended devoted exclusively to orthopedics was 15 years ago. She has no formal training in occupational medicine or physical medicine and rehabilitation; "just conferences and seminars."

18. Dr. Devalon has no information on Claimant's job duties other than what Claimant told her. She has never seen a written job description. She did not see the jobsite photos shown to Dr. Polanco.

19. Frank Polanco, M.D. performed an independent medical examination at the request of Respondent-Insurer. He reviewed medical records and diagnostic reports, as well as conducting an evaluation of the Claimant. He issued a report dated July 23, 2008, in which he opined, that Claimant's job activities did not cause Claimant's neck problems, he also opined within a reasonable degree of medical certainty that Claimant's work activities did not aggravate her neck pathology.

20. The ALJ finds Dr. Polanco's medical opinion to be more credible than that of Dr. Devalon and assigns Dr. Polanco's opinion great weight.

21. Based upon a totality of the circumstances, Claimant has failed to establish that she sustained an occupational disease involving her neck while employed by the Respondent-Employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2007), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2007). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. (2007). A preponderance of the evidence is that which leads the trier-of-fact, after con-

sidering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. (2007).

2. In accordance with Section 8-43-215, C.R.S. (2007), this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Section 8-40-201(14), C.R.S. 2007, defines an occupational disease as one which results directly from the conditions under which work was performed, is a natural incident of the work, can fairly be traced to the employment as a proximate cause, and "does not come from a hazard to which the worker would have been equally exposed outside of the employment." The requirement that the hazard not be one to which the claimant was equally exposed outside of employment effects the "peculiar risk" test and serves to insure that the disease is occupational in origin. *Anderson v. Brinkhoff*, 899 P.2d 819, 822-823 (Colo. 1993).

5. The question whether a claimant has proven that a particular disease, or aggravation of a disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

6. It is not necessary that the ALJ determine what hazards or exposures outside of the Claimant's work caused or aggravated the Claimant's degenerative disc disease because the Claimant has the burden of proof to establish that the conditions of the employment were a direct and proximate cause of the alleged occupational disease. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*.

7. If the claimant succeeds in establishing that the hazards of employment caused, intensified or aggravated a pre-existing disease process, the burden shifts to the respondents to establish both the existence of non-industrial causes, and the extent to which they contribute to the disability and need for treatment. *See Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam Inc*. W. C., Nos. 4-435-795 & 4-530-490 (August 31, 2005).

8. Additionally, *ICAO* has previously stated: "Pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation." *Witt v. James J. Keil*, Jr., W.C. No. 4-

225-334 (April 7, 1998); *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (April 11, 2007).

9. Claimant has failed to establish that hazards of her employment caused, intensified or aggravated a pre-existing disease process. As found, the credible medical and other evidence fails to show that it is more probably true than not that Claimant's neck/cervical pathology is an occupational disease arising out of and in the course of her employment with the Resopondent-Employer.

ORDER

It is therefore ordered that:

Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

DATE: November 5, 2008

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-724-425

ISSUE

The issues for determination are compensability, medical benefits, disfigurement, and average weekly wage.

FINDINGS OF FACT

1. Claimant testified that he injured his back on May 16, 2007, his first day of work for Employer. Claimant testified that he was working at the bottom of a steel 'C' channel and two co-workers on ladders were holding the 'C' channel. The piece that Claimant was working on is about teen feet tall. Claimant testified that he got something in his eye. Someone stated that it was time for lunch. Claimant testified that when he opened his eyes, the two co-workers were gone. Claimant testified that the 'C' channel began to tip over, and that he and the 'C' channel fell together. Claimant testified that he then felt pain in his low back.

2. TD, Claimant's wife, testified that she filled out a statement based on what her husband had told her about the accident. She was concerned about the requirement that injuries be reported in writing within four days. In the statement, she stated that the injury occurred on May 17, 2007, and she dated the statement on May 22, 2007, making it appear that the written statement was made five days after the accident. She also testified that the statement was made the same day that it was faxed, and that it was

faxed on May 23, 2007. The alleged accident was on May 16, 2007. The statement was faxed seven days after the accident.

3. TD did not witness the accident. She did testify as to statements and actions of Claimant that were generally consistent with Claimant's testimony of an injury on May 16, 2007. The testimony of TD is not persuasive.

4. Claimant had surgery to his low back at L4-5 on November 3, 2007. Claimant testified that he recovered, had no restrictions or symptoms, and returned to heavy work. However, the last medical report regarding this surgery was dated December 28, 2006. Dr. McMahon stated that Claimant had strained his back raking leaves. He noted that Claimant had severe pain in his low back. He recommended that Claimant not work.

5. Claimant testified that he told DD, the owner of Employer, that he had back surgery and that he did not want to do heavy lifting. Claimant testified that DD agreed that Claimant would not have to do any heavy lifting. DD testified that Claimant did not tell him that he had a back injury or surgery, or any lifting problem, and that he did not tell Claimant that he would not have to do heavy lifting. DD testified that the job involved heavy lifting, and he would not tell anyone he hired that they would not have to do heavy lifting.

6. EV, a co-worker, testified that at one time on May 16, 2007, it appeared that Claimant had something in his eye. EV testified that he asked Claimant if he was okay, and Claimant said he was fine. EV testified that Claimant did not appear to be in any pain or discomfort. EV testified that he never heard a 'C' channel fall.

7. Claimant testified that he told DD of the accident on May 16, 2007, and that DD told him to take the rest of the day off. Claimant testified that he did not have a ride home, so he continued to work. Claimant testified that he and DD waited at the end of the day for Claimant's wife to pick him up. DD testified that Claimant did not tell him that he had been injured and that he did not wait with Claimant at the end of the day for Claimant's wife to take him home.

8. Claimant testified that he went to work on May 17, 2007, the day after the alleged accident. Claimant testified that he first swept the floor and then went up to the second floor. He testified that on the second floor he lifted a truss and immediately put it back down realizing that he could not lift. Claimant testified that he then left work.

9. DD, the owner of Employer, testified that Claimant was not assigned to sweeping that morning and that other employees were assigned to that task. DD testified that Claimant left work on May 17, 2007, after telling him that he had a doctor's appointment. DD testified that Claimant did not tell him of the accident the day before, or that Claimant was seeking the medical care because of a work-related injury. Claimant did not have a doctor's appointment on May 17, 2007.

10. JN, a subcontractor who is not presently working for Employer, testified that he worked with Claimant on May 17, 2007. He testified that Claimant assisted in putting up tresses on May 17, 2007, and that Claimant was able to do this heavy work.

11. AC, a coworker who is not now working for Employer, testified that he worked near Claimant on May 16, 2007. He testified that he saw Claimant working on the 'C' channel, and that he did not see or hear a 'C' channel fall. AC testified that he worked with Claimant on May 17, 2007, and that Claimant was putting beams up into the roof. He testified that Claimant did not appear to be in discomfort. AC also testified that

Claimant on May 17, 2007, stated that he would like to be at home at the swimming pool drinking a beer.

12. Claimant testified that he discussed the accident and his back pain with DD on May 16, 2007, and May 17, 2007. DD testified that he was not aware of the claimed accident and injury until May 21, 2007. DD testified that on May 21, 2007, Claimant came to him and asked for his pay in cash. DD testified that he told Claimant he would receive his check on Friday and Claimant then stated that he would file a worker's compensation claim.

13. DD testified that Claimant called him four times on May 25, 2007, and that he kept notes on the calls. The notes (Resp. Exh. J 89) stated that at 9:00 a.m. Claimant called and stated that issues will be dealt with in court. At 11:00 a.m., someone called and left a message that he was calling on behalf of Claimant. DD's Caller ID identified that the call was made from Claimant's cell phone. At 11:19 a.m. Claimant called a left a message that he would contact the labor board, permitting, zoning, and state. At 12:48 p.m. Claimant called and left a message that was unclear.

14. Claimant first sought medical treatment for the alleged accident on May 21, 2007. This was after Claimant was notified that his employment had been terminated and after Claimant had stated that he would file a worker's compensation claim. The note from the Medical Center of Aurora states that Claimant complained of back pain with an gradual onset a week previous to that visit. The note states that the pain was dull and similar to prior episodes, and was moderate in degree. The note stated that "patient denies an injury." Another note from that visit stated that Claimant "had a fall, had to catch falling steel beam and after catching it, his back was worse again." On May 21, 2007, Claimant was examined by Michael J. Rauzzino, M.D. In a note prepared months later, Dr. Rauzzino stated that Claimant stated that on May 17, 2007, "the other workers let go the I-beam and when this happened, he tried to stop its fall, but it dropped on to the ground, and it landed him on his left side." The history Claimant gave, coming after his employment was terminated, is not persuasive.

15. The testimony of DD, AC, and JN is credible and persuasive. The testimony of Claimant is less persuasive or incredible.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo.App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo.App. 2000).

3. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. The testimony of Claimant is not as persuasive as Respondents' witnesses, or is incredible. Claimant has not established by a preponderance of the evidence that he was injured in an accident at work on May 16, 2007. The claim is not compensable.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED: *November 5, 2008*

Bruce Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-724-988

ISSUES

The sole issue determined herein is claimant's petition to reopen.

FINDINGS OF FACT

1. Claimant suffered a previous injury to her left wrist on June 9, 1991, when she fell through a plate glass, suffering a severe laceration to her wrist and forearm. She had severe loss of sensation and strength as a result of that injury as well as chronic pain. She had permanent restrictions against lifting over 25 pounds. She did not notice any protrusions on her left wrist or forearm.
2. On August 31, 2006, claimant began work for the employer.
3. On September 23, 2006, claimant suffered an admitted industrial injury while lifting 60 pounds of product. She suffered pain in her left wrist and a knot soon developed.
4. Dr. Maisel treated claimant and referred claimant to Dr. Zickefoose. A January 23, 2007, magnetic resonance image ("MRI") showed abnormal signal over the volar aspect of the left forearm. A January 23, 2007, electromyography ("EMG") showed ax-

onal injury of the median nerve, affecting both sensory and motor branches with a conduction block across the wrist. The EMG also showed ulnar nerve injury at the distal forearm with primarily demyelination affecting both sensory and motor branches.

5. On March 9, 2007, Dr. Fall performed an independent medical examination ("IME") for respondents. She diagnosed left wrist sprain with a possible ganglion cyst, scar tissue, or vascular aneurysm. She agreed that claimant was not at maximum medical improvement ("MMI") and needed a MRI with gadolinium contrast.

6. The April 3, 2007, MRI with contrast showed probable distal radioulnar joint instability, extensor carpi ulnaris tendinosis, probable degenerative fraying of the triangular fibrocartilage with slight subcortical cyst formation, and probable partial tear of the volar navicular lunate intercarpal ligament.

7. On May 24, 2007, Dr. Marin performed endoscopic surgery for a left carpal tunnel release, debridement of a neuroma of the median nerve, debridement of a neuroma of the ulnar nerve, and tenolysis of the tendons.

8. On June 21, 2007, Dr. Marin reexamined claimant, who complained of shooting pain from the neuroma to the fingers. On July 5, 2007, Dr. DeRuiter examined claimant, who again reported that she still suffered shooting pains from the neuromas to the fingertips.

9. On August 29, 2007, Dr. Marin reexamined claimant, who reported still significant pain in her wrist and intermittent shooting pain down the hand to the fingers. Dr. Marin noted that, if claimant continued to suffer pain, he would recommend complete resection of the neuroma and a graft repair.

10. On September 13, 2007, claimant underwent a functional capacity evaluation, which was valid. On October 1, 2007, Dr. Zickefoose determined that claimant was at MMI.

11. On October 16, 2007, Dr. Zickefoose issued her report, noting that claimant still had numbness over the dorsal fourth and fifth metacarpi of the left hand as well as old numbness from the 1991 injury. Claimant reported problems gripping, including sweeping with a broom. Dr. Zickefoose recommended post-MMI maintenance treatment for one year, including Lexapro and Vicodin prescriptions. She imposed restrictions against lifting over 8 pounds frequently or 16 pounds occasionally with both hands. She noted that claimant's unilateral left hand grip strength was 6 pounds. Dr. Zickefoose also noted that claimant was limited to repetitive left hand use of 10 minutes at one time and 20 minutes per hour. Dr. Zickefoose determined 9% impairment of the upper extremity.

12. On November 6, 2007, the insurer filed a final admission of liability for the permanent impairment rating and for post-MMI medical benefits. Claimant timely objected.

13. On October 31, 2007, Dr. Marin reexamined claimant and concluded that the debridements had not helped claimant's hand numbness.

14. On January 2, 2008, Dr. Marin reexamined claimant, who still reported a lot of discomfort. Dr. Marin recommended allowing an additional period for healing after the May 2007 surgery.

15. On January 2, 2008, Dr. Kurz also reexamined claimant, who denied any changes in her signs or symptoms.

16. On March 28, 2008, hearing was held in this claim. On April 16, 2008, the judge issued an order awarding claimant disfigurement benefits, ordering the insurer to pay

medical benefits after March 28, 2008, and denying Lexapro and medical treatment before March 28, 2008. Neither party appealed.

17. On April 30, 2008, Dr. Marin reexamined claimant and noted that she did not get any relief from the May 2007 debridement. He recommended neuroma excision for the medial and ulnar nerves and placement of an interspaced neuro tube.

18. On May 15, 2008, Dr. Parks performed a medical records review for respondents. He concluded that the surgery recommended by Dr. Marin was to correct the 1991 injury. He noted that the neuromas formed during the healing of the severed nerves in 1991. He described a "neuroma" as a "tumor of nerves" with the cut nerve endings balled up in a lump, causing exquisite sensitivity and dysesthesias. Dr. Parks noted that the May 2007 surgery, freeing up large neuromas in continuity from a bed of scar tissue, could result in precipitation of severe pain. Dr. Parks noted that claimant likely disrupted scar adhesions with the industrial injury and her pain and hand function had worsened since the surgery. He related claimant's current pain to the industrial injury and subsequent surgery. He recommended that claimant be referred to a pain management specialist for neuropathic pain medications.

19. On June 18, 2008, Dr. Kurz reexamined claimant, who denied any worsening.

20. On June 25, 2008, claimant filed a petition to reopen her claim based upon a change of condition, and she attached the April 30, 2008, medical report by Dr. Marin.

21. On August 20, 2008, Dr. Fall performed a repeat IME for respondents. Claimant reported that, after her surgery, her "knot" went away and then came back, but she could not recall when it recurred. Claimant reported that everything was still the same since MMI. Claimant reported that her numbness and weakness remained the same after the May 2007 surgery, but her pain increased for a while and then got better. Claimant reported that she suffered constant pain in the left wrist, which increased with use. Dr. Fall diagnosed scar tissue irritation. Dr. Fall concluded that claimant's condition had not worsened since MMI. Dr. Fall agreed with Dr. Parks that the surgery recommended by Dr. Marin was to treat the 1991 injury rather than the 2006 industrial injury. She agreed with Dr. Parks regarding referral to a pain management specialist.

22. At hearing, Dr. Fall agreed that the work injury had aggravated tissue from the 1991 injury. She noted that claimant had reported that the "knot" returned before MMI. Dr. Fall noted that one cannot measure the size of a neuroma by any external appearances.

23. At hearing, claimant testified inconsistently. She admitted that she had severe left hand and wrist pain, weakness, and a bump at the time of MMI and that her pain and swelling are the same as at MMI. Claimant could not recall the approximate time when her "knot" returned after the surgery. She testified that it was after MMI, but then later testified that it returned about three to four months after the May surgery. She could not distinguish her symptoms now from those at MMI.

24. Claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition since MMI. The medical records show consistency of symptoms after the May 2007 debridement surgery and before the October 1, 2007 MMI. Dr. Marin does not document that claimant is worse; he simply waited before recommending the surgery that he initially discussed on August 29, 2007. The notes by Dr. Kurz and Dr. Fall document no changes in claimant's condition. Claimant's own testimony was inconsistent and failed to demonstrate that she suffered a change of condition.

CONCLUSIONS OF LAW

1. Claimant sought to reopen this claim in order to obtain additional surgery. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). As found, claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition since MMI.

2. Because claimant failed to prove that her claim should be reopened, the issue of authorization for the future surgery by Dr. Marin is moot.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

DATED: November 5, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-730-423

ISSUE

The following issue was raised for consideration at hearing:

Whether Respondent's have overcome the opinion of the Division Independent Medical Examiner, Dr. Bart Goldman, regarding the question whether Claimant is at maximum medical improvement (MMI).

PARTIES' STIPULATIONS

The parties entered the following stipulations.

1. If Claimant is not at MMI, Claimant is owed temporary total disability benefits (TTD) from June 1, 2007 and continuing.

2. Claimant's average weekly wage is $815.00 per week.

3. Respondents are entitled to take an offset for short-term disability benefits paid to Claimant from July 11, 2007 to November 26, 2007.

4. Respondents are entitled to take an offset for unemployment compensation benefits paid to Claimant in the amount of $413.00 per week from March 1, 2008 to current.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are entered.

1. On June 10, 2006, while working for the Employer, Claimant was mopping the stairs, walking down backwards and twisted her left ankle and turned to the left, grabbed the stair rail stretching out over the stairs and she heard a popping sound in her back and had immediate pain in her lower back and hip area.

2. Claimant went to the control center and reported the injury to Sargent Terry Walker, her supervisor, who referred her to Sterling Regional Medical Center and completed an accident report.

3. On June 10, 2006, at Sterling Regional Medical Center, Claimant described the accident as, "mopping stairway, walking down stairs, stepped side ways on step edge, left leg twisted around and caught myself from falling, felt pop in hip."

4. On June 10, 2006, the nurse at Sterling Regional Medical Center noted "Left leg/hip pain 'toes a little numb' mopping stairs, stepped on edge of step of stairs, twisted, caught herself instead of falling "heard and felt pop," and noted pain in the hip/buttock and leg area and stated "when walking feels numbness with toes."

5. On June 10, 2006, Dr. David Powell at Sterling Regional Medical Center diagnosed "muscle strain' and noted "yes" the injury is work related and recommended pain medication, muscle relaxers and x-rays.

6. On June 20, 2006, Paulette Carpenter, nurse practitioner at Sterling Regional Medical Center, noted "approximately one week ago on 6/10/06, she was mopping the stairway, lost her footing and her left foot went out and ended up twisting and grabbing the rail to keep from falling… She does feel a sharp, shooting sensation from her left buttock area up to her neck." On exam, it is noted "There is tenderness to palpation to the lumbar region and in her left buttock area" and physical therapy, Ibuprofen and Flexeril was recommended.

7. On June 20, 2006, Nurse Carpenter noted under work related medical diagnosis, “Left lumbar strain” and claimant was limited to lifting, carrying, pushing, and pulling of no more than 10 pounds.

8. On June 20, 2006, Emergency Department Trauma Records, Nurse K. Contreras, noted “Left hip, neck, left shoulder, right and left side of back muscle spasms, twisted hip at work, workers comp.” She recommended Ibuprofen, Flexeril, and circles placed on a form by the nurse reflects that Claimant had pain in back, left hip, left neck, and shoulder area. Under notes it states, “Left hip, neck, left shoulder and back pain/spasms. Patient reports having a workers compensation injury on June 10, 2006 and patient reports pain has gotten worse.”

9. On June 20, 2006, at East Morgan County Hospital, Dr. Carpenter noted “Lumbar strain” and “Left hip strain, L5-S1 nerve root compression and myofascial tightness.” and “6-10 patient works at prison, steps backward off step and hurt left hip” and “patient has had constant pain in left hip and neck since.”

10. On June 23, 2006, the physical therapist at East Morgan County Hospital noted lumbar strain, left hip strain, L1-S1 nerve root impingement and increased myofascial tightness, and problems are in the left hip, low back, thoracic, and C-spine.

11. On June 28, 2006, Michael Speight, physical therapist, at Regional Medical Center noted that Claimant “was doing some mopping at work, stepped backwards down a step and missed a step, started to fall backwards, twisted to the left, and caught herself on a rail but did not fall all the way down. As she was going down and twisting, she felt a pop in the area of her left hip,” and “pain started in the left hip and left low back area. Now it is going up her back into her mid back and even the left and central neck area. She states she feels stiff all the time. Primary pain is in the left low back and left hip area. States that initially the pain was just in the hip and low back, and then a couple of days later it went into the lower extremity and then more recently started going up her back.” He assessed the following, “Need to rule out disk pain as a likely scenario. Today’s subjective and objective testing would be consistent with this. Her symptoms are asymmetrical with radiating intermittently minor symptoms into the left lower extremity below the knee.”

12. On July 10, 2006, Dr. Fillion stated “The patient presents to the clinic for follow up workman’s comp. Back pain and left upper extremity injury, which occurred as a result of her back pain” and the doctor placed her at MMI with no permanent impairment.

13. On July 10, 2006, Claimant testified when she saw Dr. Fillion she was still having pain in her neck and back but had to stop taking the medications

because she was having problems staying awake on the medication during her graveyard shift.

14. On July 10, 2006 the physical therapist, Michael Speight, noted under objective findings "Elevate range tight and painful. Patient not able to do any extension strengthening due to pain" and, the therapist assessed, "Much better, but a long way from fully recovered. Needs to avoid flexion and do extensions frequently."

15. On July 10, 2006, Mr. Speight noted "2" was the current pain intensity on a 10 point scale; "5" was the current pain frequency on a 10 point scale; and current recovery is 65 out of 100. Mr. Speight further noted that "She still has limited range and pain in her low back. Flexion has not been recovered yet, as due to pain she is not ready for this. I did try to start lumbar strengthening exercises, but due to pain she was not able to start these exercises."

16. After July 2006, Claimant attempted to contact the adjuster and her work to go back to Dr. Fillion due to the pain in her back and neck. Claimant did not receive a response.

17. On June 1, 2007, Dr. Dilley noted that Claimant has tingling in the left side of her face, tingling down her right arm, tingling in her legs and feet, and… "complains of severe cervical pain and spasm." The doctor noted that Claimant's symptoms have been going on approximately a year and over the past four days it has gotten worse. The doctor recommended that Claimant take off work through June 4, 2007, prescribed Vicodin, and a MRI.

18. On June 11, 2007, Claimant went to Fort Collins Neurology because the stiffness in her back and neck and her headaches got worse.

19. On June 11, 1007, Dr. Curiel, the neurologist, noted that Claimant has "been experiencing intermittent neck pain and low back pain since she was injured at work a year ago. At that time she apparently slipped on stairs and did not actually fall to the ground but was able to grab onto the handrail and kept from falling down. She wrenched her back, however, and noticed low back pain. A couple of days later she started noticing neck pain as well. Since then the neck and low back pain have been occurring about once a month and could last anywhere from one to seven days." The doctor recommended a cervical MRI.

20. On June 13, 2007, Dr. Dilley noted that Claimant had cervical and upper thoracic back pain and on objective evaluation "spasm at C1-5" and "spasm at T2-6 bilaterally" and recommended "no lifting objects greater than ten pounds or pushing or pulling greater than 10 pounds."

21. On June 18, 2007, a cervical MRI reflected a disk protrusion at C5-6 and C6-7 on the left causing mild deformation of the cord on the left without abnormal cord signal as well as moderate left sided neural foraminal narrowing.

22. On June 18, 2007, Dr. Curiel noted the MRI showed mild bulging at several levels with some mild neural foraminal stenosis, which appeared to be worse at the left C6-7 level and the doctor recommended physical therapy.

23. On June 28, 2007, Dr. Curiel noted "neck pain intermittent over last year" and it began on "6/06". The doctor gave Claimant restrictions of no lifting more than 20 pounds, and only occasionally bending or stooping.

24. On July 5, 2007, Mr. Speight noted that there was neck pain present extending to the top of Claimant's head and it is "worsening" and "this patient has limited neck ROM due to myofascial restrictions in the left upper quarter."

25. On July 23, 2007, a workers compensation claim was filed, which stated that, on June 10, 2006 Claimant injured her neck, upper back, lower back, head, arms and legs when she was on the staircase and stepped back and fell downstairs.

26. On July 31, 2007, Respondent filed a Final Admission of Liability (FAL) placing Claimant at MMI on July 10, 2006 with no impairment. Claimant objected to the FAL and requested a Division independent medication examination (DIME).

27. On August 16, 2007, Dr. Curiel noted that "[Claimant's] neck pain is flaring up periodically," and his impression is her "neck pain is still bothering her and is aggravated by sometimes even minor movements" and the doctor recommended epidural steroid injections.

28. On August 21, 2007, Dr. Fillion diagnosed "neck and lumbar pain" and recommended spinal epidural injections and gave restrictions of no lifting, carrying, pushing or pulling more than 10 pounds.

29. On August 21, 2007, Dr. Fillion noted "She displays decreased range of motion with cervical flexion, extension, side-bending right and left" and the doctor recommended epidural steroid injections.

30. On November 2, 2007, Dr. Bart Goldman, the Division Independent Medical examiner (DIME) noted that Claimant was not at MMI and gave a provisional impairment rating of 35% whole person. He noted "her pain is still primarily throughout the left side of her body, although she notes specifically headache and neck pain, as well as left greater than right trapezius and arm pain and left greater than right low back and leg pain." On physical exam, he noted, "diminished bilateral sacroiliac motion in the back and cervical area." His impression

was chronic cervical and lumbosacral myofascial pain syndrome secondary to work related injury on June 10, 2006; mixed tension and regular headaches; depression and anxiety; L4-5 annular tear with chronic lumbosacral strain and sacroiliac joint dysfunction secondary to work related injury. He noted "the patient's low back and then neck complaints are well documented within approximately 2 weeks of the initial injury"… and "with respect to the neck, back and psychological area, the patient has had incomplete evaluation and treatment within the context of rule XVII guideline recommendations." He assessed the patient with fairly classical myofascial stigmata that certainly reproduced much of her symptomatology in the cervical and shoulder girdle region including her headaches, and he recommended trigger point injections, physical therapy, massage, trial of biofeedback, evaluation by a psychologist or psychiatrist, medications, and strengthening program.

31. On March 21, 2008, Dr. Hughes noted on physical exam of the cervical spine there was a "torticollic degree of muscular spasm present bilaterally over the posterior musculature of the cervical spine. While cervical spine extension is quite good at 65 degrees, flexion is consistently limited ranging from only 20-21 degrees as are right and left lateral flexion at 30 and 25 degrees respectively" and right and left rotation of the head was 55 and 41 degrees. Of the lumbar spine, he assessed "right-sided erector spinae muscular spasm. Lumbar ranges of motion are restricted primarily in sacral flexion at 40 degrees maximally and true lumbar flexion is 56 degrees. Significantly extension is limited basically to the degree noted by Dr. Goldman at only 10 degrees. Right and left lateral flexion are a bit more restricted than noted by Dr. Goldman, but follows the same pattern of right greater than left limitation at 17 and 22 degrees compared to Dr. Goldman's findings of 22 and 30 degrees." Dr. Hughes concluded that he "agrees completely with Dr. Goldman that she is not at maximum medical improvement" and did endorse interdisciplinary care as recommended by Dr. Goldman.

32. On April 9, 2008, Dr. Fillion noted "Patient does have an obvious antalgic gait, restricted hip flexion at 80 degrees, decreased side bending right and left" and his impression was "low back pain with radiulopathy to the left lower extremity consistent with sciatic neuralgia."

33. On April 14, 2008, Dr. Fillion noted "cervical/lumbosacral myofascial pain due to work related injury" and ordered "myofascial interventions including spray and stretch trigger point deactivation, massage, heat … and two additional physical therapy." He recommended a lumbar MRI for "radiculopathy unrelenting for 11 days."

34. On April 18, 2008, a MRI of the lumbar spine showed "left paracentral to postero lateral disk extrusion with mild cranial migration… This extrusion abuts and compresses the left SI nerve root," "mild to moderate lower lumbar spine facet joint arthropathy;" and "mild foraminal stenosis bilaterally at L3-4."

35. Claimant testified at the hearing she feels she needs the treatment recommended by Dr. Goldman because she has pain in her lower back, neck and hip and the pain has gotten worse in her left leg and making it numb on the bottom of her foot. She testified it radiates down her leg and her left leg now is numb on the left side from her buttocks all the way down to the bottom of her foot.

36. Dr. Fillion testified at his deposition that he did not feel Dr. Goldman was wrong in his report, he just did not see her at the time he had seen her on July 10, 2006.

37. It is found, based on the totality of the evidence, that Respondent did not overcome the opinion of the DIME physician regarding MMI by clear and convincing evidence. In this regard, the totality of Claimant's medical record, along with Dr. Goldman and Dr. Hughes's opinions, were found more credible and persuasive than the evidence presented by Respondent.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. Section 8-42-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See, *Magnetic Engineering v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

4. In this case, Respondent seeks to overcome the opinion of the DIME physician, Dr. Goldman, regarding MMI. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the finding of a DIME physician with regard to the impairment rating and MMI determination (rating/IME) shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME (rating/MMI) must produce evidence showing it highly probable the DIME (rating/MMI) is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro, supra.*

5. Based on the totality of the evidence presented at hearing, it is concluded that Respondent failed to establish by clear and convincing evidence that the determination of the DIME physician with regard to MMI is most probably incorrect. Dr. Goldman and Dr. Hughes's opinions concerning whether Claimant is at MMI is more credible and persuasive than the opinions of Respondent's witnesses. The medical records and Claimant's credible testimony further corroborates the determination of Dr. Goldman. Respondent failed to present clear or convincing evidence that Dr. Goldman's opinion was incorrect. Therefore, the determination of the DIME physician that Claimant is not at MMI is the law of the case.

ORDER

It is therefore ordered that:

1. Dr. Goldman's DIME opinion that Claimant is not at MMI was not overcome by Respondent by clear and convincing evidence.

2. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: November 25, 2008 Margot W. Jones

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-734-158

ISSUE ON REMAND

Did the Respondents prove by a preponderance of the evidence that Claimant is responsible for his termination and therefore not entitled to temporary total disability benefits?

FINDINGS OF FACT WITH RESPECT TO REMAND

1. On August 7, 2007 Claimant was an employee of Respondent-Employer. Claimant was hired as a finisher but also did some carpentry work.
2. On August 7, 2007 Claimant was assigned to a job at the United States Air Force Academy (USAFA). Claimant's job location was within a secured facility that required someone with a security badge in order to gain access into the facility. Claimant was not provided with a security badge and thus had to rely upon a co-worker in order to gain access if he were outside the facility.
3. On August 7, 2007 Claimant started his day at 6:15 a.m. Claimant was working on an elevator shaft within the secure facility. Claimant was engaged in using a hammer drill, to drill holes into the sides of the concrete elevator structure.
4. Later in the day Claimant informed K that he would need to be on light duty due to his injury.
5. While Claimant was working the USAFA job he left the secured facility repeatedly and would get locked out without any way to get back in until someone showed up with the security pass. Although Claimant would then try to help other co-workers who were working on the outside of the facility, the particular job he was supposed to be doing went undone until he could once again gain access to the facility.
6. Claimant was aware of the constraints in place with respect to access to the secure facility. On August 7, 2007 Claimant left the facility approximately seven times and was unable to gain immediate access back into the facility. As a result Claimant was unable to do his primary job for up to two hours. The ALJ finds that Claimant intentionally timed his cigarette breaks so that he would be locked out and unable to perform his primary job.
7. On August 8, 2007 Claimant reported to the office as instructed by AK the previous day. When Claimant arrived M informed him that he was being terminated. Claimant was terminated because he had been locked out of the facility too many times. Mr. M tried to place Claimant with two of his former foremen but they weren't willing to work with him.
8. With respect to the circumstances surrounding Claimant's termination from employment the ALJ finds Claimant was responsible for his termination. The ALJ finds that the credible evidence establishes by a preponderance of the evidence that the Claimant failed to take reasonable measures to ensure his ability to have continued access to the secured facility and purposefully timed his breaks to make reentry difficult.
9. The Respondent-Insurer is not responsible for temporary total disability benefits.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

2. In accordance with Section 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Claimant was purposefully taking breaks so as to inhibit his ability to return to the secure facility and resume his assigned work. Claimant was terminated as a result of this. The ALJ concludes that the Claimant was responsible for his termination within the meaning of § 8-42-103(1)(g) and 8-42-105(4), C.R.S. 2007.

ORDER

It is therefore ordered that:

1. Claimant's claim for temporary total disability benefits is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

DATE: November 14, 2008

Donald E. Walsh
OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-734-338

ISSUE

Whether Claimant has presented substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked for Employer as a plumber. On August 22, 2007 he suffered an admitted industrial injury to his right hand and wrist during the course and scope of his employment.
2. On August 23, 2007 Claimant underwent surgery with John M. Pav, M.D. to repair nerves and tendons in his right wrist. He subsequently completed a course of physical therapy. Dr. Pav discharged Claimant from care in January 2008.
3. On May 21, 2008 Claimant reached Maximum Medical Improvement (MMI) for his industrial injury. Brian J. Beatty, D.O. assigned Claimant a 19% upper extremity impairment rating. Dr. Beatty's report was silent regarding the issue of maintenance medical benefits.
4. On August 25, 2008 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Beatty's impairment rating. The FAL denied medical maintenance benefits for Claimant.
5. Claimant initially objected to the FAL and requested a Division Independent Medical Examination (DIME). He subsequently withdrew the request for a DIME but has contended that he is entitled to receive medical maintenance benefits.
6. On October 6, 2008 Claimant visited Dr. Pav because he continued to experience pain and stiffness in his right hand and wrist. Dr. Pav directed Claimant to undergo additional physical therapy.
7. Claimant credibly testified that he has experienced pain, tightness, loss of sensation and cramping in his right hand and wrist since January 2008. He explained that while he was undergoing physical therapy he received nylon gloves to relieve the swelling in his right hand. Claimant noted that he subsequently purchased replacement gloves to alleviate his symptoms.
8. Claimant credibly commented that his pain became more pronounced when he began performing his duties as a plumber for a new employer. He noted that his right hand symptoms continue to limit his ability to perform his required tasks. Claimant explained that he thus desires additional medical treatment.
9. Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Although medical providers have not prescribed medical maintenance benefits, Claimant credibly testified that he has continued to experience pain, tightness, loss of sensation and cramping in his right hand and wrist. Claimant obtained nylon gloves during physical therapy to relieve the swelling in his right hand. He has subsequently replaced the gloves because they alleviate his right wrist and hand symptoms. Claimant also credibly commented that his

right hand symptoms become more pronounced when he is performing his duties as a plumber for a new employer and that his right hand condition limits his ability to perform his required tasks. Finally, Claimant has visited Dr. Pav because of continued symptoms and was directed to undergo additional physical therapy. Based on Claimant's persuasive testimony, he is entitled to a general award of medical maintenance benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A worker's compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. To prove entitlement to medical maintenance benefits, a Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determina-

tion by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Although medical providers have not prescribed medical maintenance benefits, Claimant credibly testified that he has continued to experience pain, tightness, loss of sensation and cramping in his right hand and wrist. Claimant obtained nylon gloves during physical therapy to relieve the swelling in his right hand. He has subsequently replaced the gloves because they alleviate his right wrist and hand symptoms. Claimant also credibly commented that his right hand symptoms become more pronounced when he is performing his duties as a plumber for a new employer and that his right hand condition limits his ability to perform his required tasks. Finally, Claimant has visited Dr. Pav because of continued symptoms and was directed to undergo additional physical therapy. Based on Claimant's persuasive testimony, he is entitled to a general award of medical maintenance benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall receive medical maintenance benefits that are reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

2. Any issues not resolved in this Order are reserved for future determination.

DATED: November 25, 2008. Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-737-293

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury during the course and scope of her employment with Employer on October 2, 2007.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable and necessary medical benefits that are designed to cure and relieve the effects of an industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits and Temporary Total Disability (TTD) benefits as a result of her industrial injury.

STIPULATION

The parties entered into the following stipulation prior to the hearing in this matter: Claimant earned an Average Weekly Wage (AWW) of $953.09.

FINDINGS OF FACT

1. Employer is an organization that provides vocational rehabilitation and counseling to individuals. Claimant works for Employer as a site supervisor who is responsible for the mailroom. She oversees seven permanent employees and several temporary employees who are also clients of Employer. Claimant began working for Employer in 1992.

2. Claimant testified that on October 1, 2007 she left work early because she was experiencing menstrual cramps. She told Employer that she was leaving early because she was sick.

3. Claimant explained that on October 2, 2007 she was talking with her assistant T about an emergency housing need for a homeless client. Because the office was very busy, crowded, and noisy, Claimant and Ms. T went outside for a "smoke break" to continue their conversation about the client.

4. Claimant and Ms. T entered Employer's asphalt parking lot area. Claimant testified that Ms. T offered her a drink. Claimant recounted that when she stepped back, she tripped on a water hole cover that was one to two inches deep in the asphalt. She fell backwards, struck her head on the ground and lost consciousness. The fall occurred at approximately 10:00 a.m.

5. Claimant acknowledged that she was under stress at the time of the accident but denied that she was feeling dizzy or lightheaded. She testified that all documentation reflecting that she was dizzy, lightheaded or fainted was inaccurate. Claimant specifically remembered tripping over the water hole cover and falling.

6. Claimant explained that she missed work as a result of the injuries she sustained in the fall. She commented that she has experienced neck pain, lightheadedness and headaches since the accident. She has not returned to full duty employment and currently works 32 hours each week. Although Claimant has received full wages since the date of the accident, she has been paid for her missed work time by using accumulated sick leave.

7. Ms. T testified that she witnessed Claimant's fall. She explained that she had been outside with Claimant walking on asphalt for approximately 10 minutes prior to Claimant's fall. Ms. T stated that Claimant commented that she was feeling lightheaded. Ms. T then offered her a drink. While looking at Claimant's face, Ms. T noticed that something was clearly wrong. Ms. T noted that Claimant then collapsed, fell backward and struck her head on the asphalt. Because Ms. T was looking at Claimant's face, she did not know if anything caused

Claimant to trip and fall. Nevertheless, Ms. T commented that water hole covers existed in the asphalt surface where Claimant fell. Claimant lost consciousness after the fall and was immediately transported to the Veteran's Administration (VA) Hospital on Employer's site for medical treatment.

8. An emergency room note dated October 2, 2007 reflects that Claimant was outside smoking, complained of feeling dizzy and stretched out her hand to steady herself. However, Claimant was unable to hold herself, fell down and struck her head on the ground. Claimant's reported history from the previous day included abdominal soreness, diarrhea and vomiting. The report noted that Claimant's vomiting resolved, but she had experienced three loose stools since the morning. Emergency room treatment consisting of hydration with saline resolved Claimant's dizziness. The medical provider's impression was dizziness with near syncope. The dizziness was likely caused by dehydration secondary to diarrhea and vomiting.

9. Handwritten notes from the VA Hospital dated October 2, 2007 reflect that, based on the description of a witness, Claimant fell backwards while suffering syncope. Claimant was alert and responsive by 10:05 a.m. By 10:50 a.m. Claimant was aware that she had fallen but did not remember the circumstances. She recounted that she had experienced diarrhea on the previous day and that she felt better after receiving intravenous fluids. Claimant's treatment plan involved hydration and rest.

10. On October 2, 2007 Claimant signed a hand written document entitled Employee's Injury Report to Employer. Under "Employee's explanation of the injury," the document reveals that Claimant "got dizzy, fell back hit the back of my head on ground." Claimant testified that she signed the document but denied that she provided the description of the injury.

11. On October 2, 2007 an Accident Investigation Report was prepared. Under the section entitled "Description of Accident," the document states "[Claimant] was walking back inside from smoking a cigarette. Informed coworker (Bea T) that she felt faint, immediately after her knees buckled, she fell backward, hit back of head on cement." Under Cause of Accident, the document provides, "possible illness; left work early day prior due to stomach illness."

12. On October 3, 2007 Ms. T prepared a statement about the October 2, 2007 incident. Ms. T recounted that she had left Employer's building with Claimant in order to discuss the housing needs of a homeless client. Ms. T's statement provides, in relevant part,

> During the discussion, [Claimant] was feeling stressed not knowing how to resolve the situation. When we were coming back in, [Claimant] stopped, and stated she felt a little lightheaded. [Claimant] was standing in front of two water hole covers (they looked like man holes – only smaller) when I noticed her knees starting to get

shaky and she stepped back and fell – hitting her head on the ground and was unconscious for at least 10-12 seconds.

13. On October 4, 2007 Claimant visited the VA Emergency Room for follow-up treatment. The report notes that Claimant "had syncopal episode while at work, felt to be volume issue related to vomiting and diarrhea."

14. On October 5, 2007 Claimant provided a recorded statement about the October 2, 2005 incident. She stated that she had been outside talking to Ms. T and became lightheaded. Claimant explained that she "felt really weird" and grabbed onto Ms. T's hand. Ms. T then offered her a drink and "just as she put her straw to my lips, that's when I don't remember anything else." Claimant next remembered "waking up off the floor." Claimant acknowledged that she completed the "Employer's First Report of Injury" based on the details she had disclosed to Ms. T on the day of the accident. More specifically, Ms. T had written Claimant's statement on a piece of paper on the day of the incident and Claimant subsequently copied the notes onto the First Report of Injury.

15. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury during the course and scope of her employment with Employer on October 2, 2007. Claimant testified that she tripped and fell on a water hole cover in Employer's parking area. She denied that she felt lightheaded or dizzy immediately prior to the fall. However, her testimony is inconsistent with the large body of evidence presented at the hearing in this matter. Medical records from the day of the incident reflect that Claimant fell to the ground because she was dizzy and lost her balance. The medical records suggest that Claimant required hydration because she had suffered vomiting and diarrhea on the previous day. Moreover, an Employee's Injury Report to Employer and an Accident Investigation Report reveal that Claimant felt faint and dizzy, fell backwards and struck her head on the ground. Claimant's recorded statement also specifies that she felt lightheaded immediately prior to striking her head on the ground. The preceding statements are more reliable than Claimant's statements at the hearing because they were prepared shortly after the October 2, 2007 accident. Finally, eyewitness Ms. T's account demonstrates that Claimant felt lightheaded and her knees became shaky immediately prior to the fall. The persuasive evidence thus demonstrates that Claimant suffered from lightheadedness and dizziness that caused an unexplained fall. Claimant has therefore failed to establish a direct causal relationship between the conditions of her employment and her injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim

has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment. *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. App. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich,* 379 P.2d at 383. Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *Swanson,* W.C. No. 4-589-545. It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995).

6. The fact that an employee is injured on an employer's premises does not establish a compensable injury. *See Finn v. Industrial Comm'n.,* 165 Colo. 106, 437 P.2d 542 (1968). The burden remains on the claimant to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injury. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). When a claimant has fallen at work but fails to establish that her employment caused the fall she has sustained a "truly unexplained fall." *See In re Ismael,* W.C. No. 4-616-895 (ICAP, July 3, 2007). Therefore, a "truly unexplained fall" is not compensable simply because it occurred in the course of employment. *In re Blunt,* W.C. No. 4-725-754 (ICAP, Feb. 15, 2008). Whether there is a sufficient nexus or causal relationship between a claimant's employment and the injury is a question of fact for the ALJ. *In re Ismael,* W.C. No. 4-616-895 (ICAP, July 3, 2007).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury during the course and scope of her employment with Employer on October 2, 2007. Claimant testified that she tripped and fell on a water hole cover in Employer's parking area. She denied that she felt lightheaded or dizzy immediately prior to the fall. However, her testimony is inconsistent with the large body of evidence presented at the hearing in this matter. Medical records from the day of the incident reflect that Claimant fell to the ground because she was dizzy and lost her balance. The medical records suggest that Claimant required hydration because she had suffered vomiting and diarrhea on the previous day. Moreover, an Employee's Injury Report to Employer and an Accident Investigation Report reveal that Claimant felt faint and dizzy, fell backwards and struck her head on the ground. Claimant's recorded statement also specifies that she felt lightheaded immediately prior to striking her head on the ground. The preceding statements are more reliable than Claimant's statements at the hearing because they were prepared shortly after the October 2, 2007 accident. Finally, eyewitness Ms. T's account demonstrates that Claimant felt lightheaded and her knees became shaky immediately prior to the fall. The persuasive evidence thus demonstrates that Claimant suffered from lightheadedness and dizziness that caused an unexplained fall. Claimant has therefore failed to establish a direct causal relationship between the conditions of her employment and her injury. *See In re Gray,* W.C. No. 4-721-655 (ICAP, Sept. 25, 2008) (where claimant passed out and could not explain what caused him to fall, his fall was unexplained and therefore not compensable).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for workers' compensation benefits is denied and dismissed.

DATED: November 3, 2008.

Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-741-264

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on October 18, 2007 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury.

FINDINGS OF FACT

1. Prior to the hearing in this matter, the Office of Administrative Courts mailed the Notice of Hearing to Respondent at his last known address. Respondent thus had proper notice of the hearing in this matter. Nevertheless, Respondent failed to appear.
2. Claimant worked for Employer performing various construction duties.
3. Claimant credibly testified that on October 18, 2007 he was performing construction duties for Employer on a private home. As he was walking in the dark on a wood floor, he tripped over a bucket and lost his balance. He fell to the ground and fractured his right ankle.
4. Employer drove Claimant to a hospital emergency room for treatment. After obtaining initial treatment, Claimant was directed to visit an orthopedic surgeon.
5. On October 24, 2007 Mark S. Fitzgerald, M.D. performed surgery on Claimant. The surgery involved the insertion of hardware into Claimant's right ankle.
6. Claimant suffered a deep vein thrombosis (DVT) in his right ankle as a result of his surgery. He was treated with the blood thinner Coumadin to prevent clotting. Claimant required Coumadin treatment until June 2008.
7. Claimant also suffered an abscess in his right ankle. On March 21, 2008 he underwent surgery to remove the hardware in his right ankle and relieve the abscess.
8. Claimant's medical expenses as a result of his October 18, 2007 right ankle injury totaled $16,325.90.
9. Claimant has established that it is more probably true than not that he suffered a right ankle injury during the course and scope of his employment with Employer on October 18, 2007. He credibly testified that he fractured his right ankle while performing construction duties for Employer.
10. Claimant has demonstrated that it is more probably true than not that he received reasonable and necessary medical treatment to cure and relieve the effects of his industrial injury. His need for medical treatment subsequent to October 18, 2007 was designed to alleviate the effects of his right ankle fracture. Claimant underwent two sur-

geries to repair his right ankle and required medication for the DVT that developed after his surgery. He incurred medical expenses totaling $16,325.90.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. As found, Claimant has established by a preponderance of the evidence that he suffered a right ankle injury during the course and scope of his

employment with Employer on October 18, 2007. He credibly testified that he fractured his right ankle while performing construction duties for Employer.

Medical Benefits

6. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

7. As found, Claimant has demonstrated by a preponderance of the evidence that he received reasonable and necessary medical treatment to cure and relieve the effects of his industrial injury. His need for medical treatment subsequent to October 18, 2007 was designed to alleviate the effects of his right ankle fracture. Claimant underwent two surgeries to repair his right ankle and required medication for the DVT that developed after his surgery. He incurred medical expenses totaling $16,325.90.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable workers' compensation injury during the course and scope of his employment with Employer on October 18, 2007.

2. Respondent is financially responsible for Claimant's medical expenses totaling $16,325.90.

DATED: November 19, 2008. Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-745-895

ISSUES

The issues presented for consideration at hearing are compensability and medical benefits.

FINDINGS OF FACT

1. Claimant began working for the Employer in approximately March of 2007.

2. He was assigned to Coors, where he worked in the labeler production area.

3. On December 22, 2007, he carried two boxes to a conveyor, put them down and then bent over and went under the conveyor belt. When he stood up, he felt a pull in his back.

4. Claimant initially thought the pain would go away, but as he continued to work, it got worse.

5. When Claimant went to his first break, he told his supervisor, J S, of his work injury. Mr. S asked him if he could work the rest of the shift. Claimant said that he would try.

6. Claimant continued to work his shift, but his back pain increased. During the next work break, he informed Mr. S that his back was worse and Mr. S called security.

7. Security contacted Claimant and then called paramedics. The paramedics examined Claimant and transported him by ambulance to Lutheran Hospital.

8. Claimant was treated at Lutheran Hospital and referred to Concentra for further treatment. Claimant was given lifting restrictions and he returned to work for Coors.

9. Claimant testified that he was only allowed to work for the Employer at Coors for nine months and then he would have three months off. C R, the onsite supervisor for the Employer, testified that this was the arraignment Coors had made with the Employer.

10. Claimant and Ms. R both testified that Claimant was injured on the day before his last day on the Coors assignment.

11. Ms. R testified that the claim was denied because the alleged injury occurred the day before Claimant was to leave his assignment at Coors.

12. Claimant and Ms. both testified that the Clamant continued to work at Coors after the nine months had expired and that he was finally laid off when he was released to return to work without restrictions. Ms. R testified that it was company policy that temporary workers under restrictions continue to work after the assignment would have otherwise been terminated.

13. After the assignment terminated the Employer assigned Claimant to a job at the Pepsi Center.

14. Clamant was diagnosed by Dr. Thomas Gray and Dr. John Burris as having a lumbar strain. The treatment that Clamant received for his injuries consisted of therapy and sometimes painful injections.

15. It is found that Claimant was injured on December 22, 2007 while working at Coors for the Employer.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

1. The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. Section 8-42-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See, *Magnetic Engineering v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

4. In this case, Claimant's testimony about the mechanism of his injury was found credible and persuasive. The fact that Claimant was diagnosed with a back sprain and underwent painful treatment for the injury persuades the finder of fact that Claimant was injured while working for the Employer.

5. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

6. Since the evidence established that he suffered a work related injury, he is entitled to reasonably necessary and related medical benefits. Respondents shall be liable for these medical benefits.

ORDER

WHEREFORE, IT IS ORDERED:

1. That Respondents are liable to Clamant for medical benefits to cure and relieve the affects of his back injury.

2. That all other issues not decided by this order shall be reserved for future determination, if necessary.

DATED: November 19, 2008 Margot W. Jones

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-532

ISSUES

The issues for determination are compensability, medical benefits, reasonable and necessary treatment, and authorized provider.

FINDINGS OF FACT

1. In March 2007, Respondent-Employer hired Claimant. Claimant's job with Respondent-Employer involved the cleaning and waxing of stairwells and floors in commercial buildings.

2. On Thursday, January 10, 2008, at approximately 12:50 am, Claimant was waxing the floor in and about a stairwell when he slipped and fell on some wax landing on his buttocks and lower back.

3. Claimant did not report his injury at the time it occurred due to his inability to locate his immediate supervisor. Claimant finished his shift and went home.

4. Claimant reported the injury to his project supervisor, M, on Sunday, January 13, 2008. Claimant was not scheduled to work on Friday, January 11, 2008, or Saturday, January 12, 2008. At the time the injury was reported, Claimant was directed to Concentra Medical Center for care.

5. On January 15, 2008, Claimant presented himself to Concentra Medical Center where he was seen by the nurse practitioner. Claimant gave the nurse a history that he was cleaning stairs and waxing floors when he slipped and fell thus injuring his back.

6. The nurse practitioner examined Claimant and rendered a diagnosis of contusions to the buttocks and lumbar spine. Claimant was prescribed medication, physical therapy, and given work restrictions of no bending more than three times per hour, no squatting, no kneeling, no lifting over 10 pounds, and no pushing/pulling over 10 pounds.

7. Claimant initiated physical therapy at Concentra Medical Center on January 17, 2008. Claimant gave the physical therapist a history of slipping and falling in wax on January 10, 2008, while waxing floors. Claimant went to physical therapy on January 23, 2008. Claimant discontinued physical therapy due to non-authorization by Respondent-Insurer.

8. Claimant was seen at Concentra on January 23, 2008 and February 6, 2008. Claimant was given the same work restrictions as in his prior visit other than restricting Claimant to no lifting over 5 pounds.

9. Dr. Peterson at Concentra noted in his February 6, 2008 record that Claimant was continuing to have low back pain. Dr. Peterson noted that Clamant had gone to physical therapy two times but no further sessions had been approved due to the Respondent-Employer's failure to file a first report of injury. Dr. Peterson also noted that an MRI had not yet been authorized.

10. On February 8, 2008, Dr. Peterson discharged Claimant from further care at Concentra due to the claim being denied.

11. Claimant has continued to work his usual job with Respondent-Employer in spite of being injured. Claimant's job at Respondent-Employer entailed bending, stooping, squatting, and lifting over 10 pounds on a regular basis. Claimant continued to work as he needed money to support his family.

12. The bills for the care Claimant received at Concentra have not been paid. A letter from Concentra dated February 11, 2008, indicated that Respondent-Employer had not filed a first report of injury and that if Respondent-Employer did not file the first report of injury, the bills incurred for care rendered become Claimant's responsibility.

13. Because he was discharged from care at Concentra due to the denial of the claim, Claimant presented himself to Timothy Hall, M.D. for evaluation and treatment on June 25, 2008. Dr. Hall evaluated Claimant and opined that as a result of the January 10, 2008 slip and fall at work, Claimant has mechanical low back pain likely related to SI joint dysfunction, facet syndrome, possible discogenic pain, and probable pyriformis syndrome. Dr. Hall recommended an MRI and will prescribe treatment after the MRI results are known.

14. Claimant has continued to have problems with his low back up until the present.

15. The ALJ finds Claimant to be credible in the pertinent facts that establish compensability.

16. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back within the course and scope of his employment with Respondent-Employer.

17. Claimant has proven by a preponderance of the evidence entitlement to medical benefits. The physicians at Concentra are authorized providers. As of June 25, 2008, Dr. Hall is the authorized treating physician.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

1. An injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210 C.R.S. (2006). See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact or facts, more reasonably probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1977).

2. Claimant credibly testified that he injured himself at work when he slipped and fell while cleaning and waxing floors thus landing on his lower back and buttocks. It is recognized that Claimant has given different histories of what transpired. However, while Claimant's memory was not crystal clear, his recall credibly establishes the compensability of this claim. As found, Claimant has proven by a preponderance of the evidence that he injured his low back within the course and scope of his employment with Respondent-Employer on January 10, 2008.

3. Respondents are liable for medical treatment reasonably necessary to cure and relieve the employee for the effects of the injury. Section 8-42-101, C.R.S. (2007); *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Respondents are only liable for authorized or emergency medical treatment. See Section 8-42-101(1), C.R.S. (2007); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). The respondents have the right in the first instance to select a physician to treat the industrial injury. Section 8-43-404(5)(a), C.R.S. (2007). Once the respondents have exercised their right to select a physician, the Claimant may not change physicians without permission from the insurer or the ALJ. See *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). If the physician selected by the respondents refuses to treat for non-medical reasons and the respondents fail to appoint a new treating physician, the right of selection passes to the Claimant and the physician selected by the

Claimant becomes authorized to treat the injury. See *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Tellez v. Teledyne Water Pic v. Industrial Claim Appeals Office*, W. C. No. 3-990-062 (March 24, 1992); *Buhrman v. University of Colorado Health Sciences Center*, W. C. No. 4-253-689 (November 4, 1996).

4. Claimant was referred by Respondent-Employer to Concentra. However, Respondent-Insurer denied the claim and did not pay for any of Claimant's care at Concentra. Therefore, Dr. Kiernan refused to treat Claimant. Claimant was free to select his own physician. The treatment provided at Concentra along with all of the referrals therefrom are authorized and reasonably necessary to cure or relieve the effects of the Claimant's industrial injury. In addition as found, as of June 25, 2008, the care provided by Dr. Timothy Hall is authorized and reasonably necessary to cure and relieve Claimant from the effects of his industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Respondent-Insurer shall pay all reasonable and necessary costs of Claimant's work-related medical treatment at Concentra and any referrals therefrom.

3. As of June 25, 2008, Respondent-Insurer shall pay all reasonable and necessary costs of Claimant's work-related medical treatment with Dr. Timothy Hall.

4. The Respondent-Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

DATE: November 4, 2008

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-753-189

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on March 5, 2008 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury.

FINDINGS OF FACT

11. Claimant is a 56-year old individual who worked as an automotive technician for Employer. Claimant's job duties included the physical labor associated with performing automotive work on vehicles.
12. Claimant explained that on March 5, 2008 he was rebuilding the front-end differential on a Yukon SUV. After completing the differential assembly, Claimant contacted his coworker O and asked for assistance in installing the assembly. Claimant stated that he and Mr. O raised the assembly with a transmission jack. However, because the transmission jack did not adequately extend, they had to physically move the assembly into the differential case. Claimant used a pry bar to aid in positioning the assembly. Claimant testified that while using the pry bar he experienced a sudden pinch in his lower back that extended down his leg to his knee.
13. Claimant testified that, shortly after the incident, he took a morning break and ingested a powerful painkiller because of back pain. He explained that, although he completed his work shift, his back became increasingly painful during the course of the day.
14. Prior to March 5, 2008 Claimant suffered significant medical conditions. His feet were painful because of a condition called Morton's Neuroma. During 2005 he suffered from lower back problems without any identifiable injury. Moreover, Claimant had undergone two surgical interventions on his cervical spine. Although Claimant's conditions were painful, he worked full-duty and did not have any medical restrictions.
15. Mr. O testified that he assisted Claimant in installing the Yukon SUV differential during the morning of March 5, 2008. However, he did not notice that Claimant injured himself at the time of the installation. In fact, Mr. O stated that Claimant did not appear to be suffering any back symptoms until Claimant was leaving work for the day. Claimant told Mr. O that his back was hurting but did not disclose the cause of his pain.
16. Employer witnesses W and E testified that Claimant told them on Monday, March 3, 2008 that he had injured his back over the previous weekend while moving a fish tank. Claimant's supervisor H corroborated the accounts of Ms. W and Mr. E in a written statement.
17. Claimant stated that he had discussed moving the fish tank with Ms. W, but denied telling her or Mr. E that he had injured his back. Nevertheless, Claimant acknowledged that he was suffering from symptoms on March 3, 2008 that were severe enough to consider going to Urgent Care for treatment. He mentioned to Ms. W that he might need to visit Urgent Care. However, Claimant stated that he required treatment for his neck and not his back.
18. The record reflects that Claimant helped his daughter G move a fish tank to her basement on Sunday, March 2, 2008. Ms. G explained that Claimant helped her move a 30-gallon fish tank that had recently been drained. Ms. G commented that the tank still held one to two gallons of water, gravel and other items. She estimated that the tank weighed approximately 40-50 pounds. Ms. G and Claimant moved the fish tank down two flights of stairs. She noted that nothing unusual occurred while moving the tank.
19. Claimant's wife testified that Claimant returned home after moving the fish tank and did not appear to be suffering from any pain. He also did not mention that he sustained any injuries while moving the tank.

20. Claimant testified that after completing his job duties on March 5, 2008 he went home and put a heating pad on his lower back. He went to bed at 10:30 p.m.

21. On the morning of March 6, 2008 Claimant awoke in excruciating lower back pain. Claimant's wife went to work and scheduled an appointment for Claimant to visit Jerome C. Landblom, M.D. of the Longmont Clinic for an evaluation. Claimant's wife also contacted Ms. W at Employer's office to explain that Claimant would not be reporting for work. She did not disclose that Claimant had suffered a work-related injury.

22. At approximately 10:00 a.m. on March 6, 2008 Dr. Landblom examined Claimant. Dr. Landblom reported that Claimant was suffering "excruciating pain" in his right lower back, buttock and leg. Notably, Claimant told Dr. Landblom that the pain had begun earlier in the morning but did not mention the cause of the pain or relate the pain to any incident while performing his job duties. Claimant subsequently underwent x-rays of his lower back. Based on Dr. Landblom's examination, Claimant's history and the radiological results, Dr. Landblom arranged for Claimant's immediate admission into Longmont United Hospital.

23. Claimant was transferred to the Hospital for additional evaluation. He testified that at around 12:00 p.m. he attempted to contact Employer about his condition. Claimant sought to obtain information about Employer's workers' compensation carrier but was unsuccessful. He was directed to contact his supervisor Mr. H. Claimant left a message for Mr. H but did not hear back from him at anytime on March 6, 2008.

24. Later in the day on March 6, 2008 Claimant underwent an MRI of his lower back. The MRI revealed a herniated disk at the L4-5 level of Claimant's spine. Dr. Landblom determined that Claimant required an orthopedic consultation.

25. Claimant subsequently underwent an orthopedic evaluation with James A. Britton, M.D. Claimant reported to Dr. Britton that he "recently, over the weekend, did some significant lifting" without an identified injury, "though following that he had progressive elements of right sciatica, intermittently severe and lacinate hip-to-leg pain extending below the knee." Claimant did not tell Dr. Britton that he had injured his back the day before at his place of employment and made no mention of an injury while attempting to repair a front differential on a vehicle. Based on the evaluation, Claimant's history and the results of the MRI, Dr. Britton determined that Claimant required surgical intervention.

26. Prior to surgery on March 7, 2008 Claimant contacted Mr. H. Claimant testified that he told Mr. H that he had injured his back at work and requested the name of the designated treatment provider. Mr. H responded that he did not know Employer's medical provider.

27. Claimant was discharged from Longmont United Hospital on March 8, 2008. On March 10, 2008 Claimant conducted internet research to determine Employer's designated treatment provider. On Insurer's website Claimant discovered that the Workwell Clinic in Longmont, Colorado was Employer's designated treatment provider. Claimant visited the Workwell facility for an evaluation and was directed to continue medical treatment with Dr. Britton.

28. On March 10, 2008 Claimant also visited Employer's facility. He spoke with Mr. H and gave him a written statement noting that he had suffered a work injury and underwent surgery on March 7, 2008. Claimant submitted a claim for compensation to Insurer on March 11, 2008.

29. Claimant's post-surgical progress has been guarded. He has not returned to work and has not reached Maximum Medical Improvement (MMI).
30. Dr. Britton testified through an evidentiary deposition in this matter. He reiterated that during his initial evaluation Claimant reported that he had been doing some heavy lifting over the prior weekend but had not been injured. He also relayed that Claimant disclosed that he suffered "intermittently, progressively severe pain" following the weekend lifting incident. Claimant did not tell Dr. Britton that he injured his back while repairing a vehicle at work on March 5, 2008.
31. John S. Hughes, M.D. conducted an independent medical examination of Claimant, prepared a report and testified at the hearing in this matter. He explained that Claimant's condition on the morning of March 6, 2008 was probably caused by the fish tank-lifting episode the weekend before. Dr. Hughes noted that Claimant most likely had a genetic weakness of the connective tissues in his spine that predisposed him to either an idiopathic disc herniation or a disc herniation from a relatively minor injury. He opined that the aquarium incident probably accelerated Claimant's degenerative condition. Considering all of the evidence, Dr. Hughes concluded that Claimant suffered an annular tear while moving the fish tank and the tear suddenly opened in the early morning hours of March 6, 2008. He commented that no specific activity, trauma, or motion is necessary to cause the "dam to burst" allowing the intravertebral disc to protrude through the annulus. Dr. Hughes concluded that a gradual increase of symptoms as described by Claimant to Dr. Britton is common and a disc can herniate several days or weeks after the inciting event.
32. Claimant has failed to establish that it is more probably true than not that he suffered an industrial injury to his lower back during the course and scope of his employment with Employer on March 5, 2008. Claimant testified that he suffered an injury to his lower back during the installation of a differential assembly into a Yukon SUV on March 5, 2008. Claimant's daughter and wife testified consistently with his account that he did not appear to be suffering any pain as a result of moving the fish tank on March 2, 2008. However, Employer witnesses Ms. W and Mr. E contradicted Claimant's version of events. Ms. W and Mr. E stated that Claimant told them on Monday, March 3, 2008 that he had injured his back over the previous weekend while moving a fish tank. Furthermore, Claimant's supervisor Skip H corroborated the accounts of Ms. W and Mr. E in a written statement. Claimant also mentioned to Ms. W that he might need to visit Urgent Care on March 3, 2008. Finally, Mr. O testified that Claimant did not appear to have suffered an injury while installing the differential assembly, but Claimant was in pain later in the day from an undisclosed source. The weight of the testimony from lay witnesses thus suggests that Claimant has failed to satisfy his burden of proof.
33. The medical evidence reveals that Claimant has failed to demonstrate that an incident at work proximately caused his lower back injury or aggravated his condition. Initially, Claimant told Dr. Landblom that his lower back pain had begun earlier in the morning on March 6, 2005 but did not mention the cause of the pain or relate the pain to any incident while performing his job duties. More importantly, Claimant did not disclose any work-related injury to Dr. Britton, but instead stated that he had done some heavy lifting over the weekend without any injury but experienced "progressive elements of right sciatica, intermittently severe and lacinate hip-to-leg pain extending below the knee." Finally, Dr. Hughes persuasively testified that Claimant's condition on the morn-

ing of March 6, 2008 was probably caused by the fish tank-lifting episode during the prior weekend. Dr. Hughes noted that Claimant most likely had a genetic weakness of the connective tissues in the spine that predisposed him to either an idiopathic disc herniation or a disc herniation from a relatively minor injury. He opined that the aquarium incident probably accelerated Claimant's degenerative condition. Dr. Hughes thus concluded that Claimant suffered an annular tear from the aquarium-lifting incident and the tear suddenly opened in the early morning hours of March 6, 2008. He also commented that a gradual increase of symptoms as described by Claimant to Dr. Britton is common and a disc can herniate several days or weeks after the inciting event. The medical evidence is thus consistent with the lay testimony that Claimant suffered an injury to his lower back prior to March 5, 2008 and that the natural progression of the injury manifested itself in the form of excruciating pain on the morning of March 6, 2008. Claimant has therefore failed to establish that any of his work duties aggravated, accelerated, or combined with his lower back condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered an industrial injury to his lower back during the course and scope of his employment with Employer on March 5, 2008. Claimant testified that he suffered an injury to his lower back during the installation of a differential assembly into a Yukon SUV on March 5, 2008. Claimant's daughter and wife testified consistently with his account that he did not appear to be suffering any pain as a result of moving the fish tank on March 2, 2008. However, Employer witnesses Ms. W and Mr. E contradicted Claimant's version of events. Ms. W and Mr. E stated that Claimant told them on Monday, March 3, 2008 that he had injured his back over the previous weekend while moving a fish tank. Furthermore, Claimant's supervisor Skip H corroborated the accounts of Ms. W and Mr. E in a written statement. Claimant also mentioned to Ms. W that he might need to visit Urgent Care on March 3, 2008. Finally, Mr. O testified that Claimant did not appear to have suffered an injury while installing the differential assembly, but Claimant was in pain later in the day from an undisclosed source. The weight of the testimony from lay witnesses thus suggests that Claimant has failed to satisfy his burden of proof.

7. As found, the medical evidence reveals that Claimant has failed to demonstrate that an incident at work proximately caused his lower back injury or aggravated his condition. Initially, Claimant told Dr. Landblom that his lower back pain had begun earlier in the morning on March 6, 2005 but did not mention the cause of the pain or relate the pain to any incident while performing his job duties. More importantly, Claimant did not disclose any work-related injury to Dr. Britton, but instead stated that he had done some heavy lifting over the weekend without any injury but experienced "progressive elements of right sciatica, intermittently severe and lacinate hip-to-leg pain extending below the knee." Finally, Dr. Hughes persuasively testified that Claimant's condition on the morning of March 6, 2008 was probably caused by the fish tank-lifting episode during the prior weekend. Dr. Hughes noted that Claimant most likely had a genetic weak-

ness of the connective tissues in the spine that predisposed him to either an idiopathic disc herniation or a disc herniation from a relatively minor injury. He opined that the aquarium incident probably accelerated Claimant's degenerative condition. Dr. Hughes thus concluded that Claimant suffered an annular tear from the aquarium-lifting incident and the tear suddenly opened in the early morning hours of March 6, 2008. He also commented that a gradual increase of symptoms as described by Claimant to Dr. Britton is common and a disc can herniate several days or weeks after the inciting event. The medical evidence is thus consistent with the lay testimony that Claimant suffered an injury to his lower back prior to March 5, 2008 and that the natural progression of the injury manifested itself in the form of excruciating pain on the morning of March 6, 2008. Claimant has therefore failed to establish that any of his work duties aggravated, accelerated, or combined with his lower back condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for workers' compensation benefits is denied and dismissed.

DATED: November 14, 2008.

Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-754-858

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that on January 31, 2008, he sustained an injury arising out of and in the course of his employment?

¬ Did the claimant prove by a preponderance of the evidence that he is entitled to temporary total disability benefits commencing February 1, 2008?

¬ Did the claimant prove by a preponderance of the evidence that he is entitled to reasonable, necessary and authorized medical treatment as a result of the alleged injury?

¬ What is the claimant's average weekly wage?

¬ Did the respondents prove by a preponderance of the evidence that temporary total disability benefits should end because the claimant was responsible for his termination from employment?

¬ Should the claimant's benefits be reduced because he failed timely to report the injury in writing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The claimant began his employment with the employer in October 2007. The claimant initially worked in production, but was later promoted to work in quality assurance (QA).
2. On January 31, 2008, the claimant was employed as a QA technician responsible for analyzing the fat content of meat. The claimant worked the second shift from approximately 3:00 p.m. until 11:00 p.m. or 12:00 a.m. This job required the claimant to lift tubs of meat, and involved twisting and turning the body.
3. The claimant testified that on January 31, 2008, he slipped while carrying a tub of meat. The claimant recalled that he twisted and grabbed onto a table to prevent him from falling all the way to the floor. The claimant stated that he then experienced the onset of low back and right hip pain. The claimant associates the back and hip pain with the twisting incident.
4. The claimant testified that on January 31, 2008, he reported to his lead person, R, that he slipped and that his back and hip were hurting. However, the claimant recalled that Ms. R did not refer him for medical treatment, but instead told the claimant the injury was his own fault because he didn't keep the floor clean.
5. Ms. R testified at the hearing. Ms. R denied that the claimant reported any injury to her on January 31, 2008. Ms. R stated that if the claimant had reported an injury to her she would have referred him to Health Services for treatment, or called out for assistance if Health Services was closed.
6. On January 31, 2008, the claimant returned to his home in Brush, Colorado, a substantial distance from the employer's premises. Late on the afternoon of January 31, 2008, the claimant sought medical treatment at the East Morgan County Hospital emergency room (ER). The ER records document that the claimant reported a history of low back pain beginning either one week or three days earlier. The claimant denied a history of recent injury and denied falling. The ER notes also state the claimant did a lot of lifting, twisting, and turning, and that he "maybe pulled his back slipping at home." The claimant was diagnosed with an acute thoracic strain and acute low back pain. The ER physician prescribed medications and released the claimant.
7. On February 6, 2008, Dr. Scott Johnson, M.D., examined the claimant in Brush. Dr. Johnson notes the claimant reported that he did a lot of lifting and carrying at work, but did not report any specific injury. Dr. Johnson prescribed medications and stated the claimant should "try to return to work tomorrow."
8. The claimant returned to the employer's plant on February 7, 2008. At that time he produced medical restrictions. The claimant was referred to Health Services where he was apparently provided with additional restrictions. The claimant took the restrictions to one of his supervisors, M. The claimant testified that Ms. M sent him home because she could not provide work within the restrictions. Ms. M testified that she sent

the claimant home but told him to return the next day because she would find him work within his restrictions.

9. The claimant did not return to work on February 8, 2008. Instead, he began calling in and reporting that he would not be able to work. On February 28, 2008, the employer terminated the claimant's employment because he was not reporting for work.

10. When the claimant returned to the employer's plant on February 7, 2008, he was referred to Dr. Hector Brignoni, M.D., for treatment of the alleged industrial injury of January 31, 2008.

11. Dr. Brignoni examined the claimant on February 11, 2008. Dr. Brignoni noted that the claimant moved tubs of meat, and that the claimant "started having low back pain" on January 31, 2008. Dr. Brignoni's notes do not reflect that the claimant reported any specific injury, such as slipping and twisting. Dr. Brignoni noted the presence of some paravertebral muscle spasm and diagnosed a "lumbar strain." Dr. Brignoni referred the claimant for lumbar spine x-rays, imposed restrictions of light duty, no lifting greater than 10 pounds, and to avoid bending.

12. On February 20, 2008, Dr. Brignoni noted that the lumbar spine x-rays showed "diffuse degenerative disease of the lumbar spine." Dr. Brignoni referred the claimant for physical therapy. On March 5, 2008, Dr. Brignoni referred the claimant for a lumbar MRI.

13. On March 14, 2008, Dr. Laura Caton, M.D., saw the claimant for a "one time evaluation" at the employer's request. The claimant gave Dr. Caton a history of developing back pain after "sliding on the wet floor" at work. The claimant also gave a history of "repetitive twisting and picking up" tubs of meat. Although the claimant appeared to be in pain, he had no muscular spasm in the thoracic or lower back regions, and no tenderness in the sacroiliac region. Tests for sciatic pain were negative. Dr. Caton diagnosed a possible lumbar strain, but noted she could not find any "objective physical findings."

14. By April 3, 2008, Dr. Caton was able to review the lumbar spine x-rays. Dr. Caton persuasively testified that these x-rays demonstrate "extensive degenerative changes, age related long-term changes that would not be related in an acute injury." On April 3, 2008, Dr. Caton wrote that if the claimant's "degenerative changes were exacerbated by work activity, now that he is not working, the pain should dissipate." At hearing, Dr. Caton testified that certain activities at work could have caused the claimant to experience pain because of the arthritis, but that work activities did not cause the claimant's spine to degenerate.

15. At hearing, the claimant testified that his back and right hip were still painful and that he was having difficulty sleeping at night. The claimant opined that he needs additional medical treatment.

16. The claimant failed to prove it is more probably true than not that on January 31, 2008, he sustained an injury to his low back and right hip proximately caused by the performance of his duties as a QA technician. First, the ALJ is persuaded by the credible testimony of Dr. Caton that for a substantial period of time prior to January 31, 2008, the claimant suffered from serious degenerative spinal disease, and that this disease was not caused by the claimant's employment. The ALJ finds the claimant's testimony that on January 31, 2008, he slipped and twisted his back while performing his duties as a QA technician, and experienced the corresponding onset of low back and right hip

pain, is not credible and persuasive. First, the claimant's testimony that he immediately reported the injury to his supervisor, Ms. R, is contradicted by the credible testimony of Ms. R that the claimant did not report any back injury on January 31, 2008. Moreover, the claimant's testimony is contradicted by the history he gave at the ER when he reported for treatment late on the afternoon of January 31, 2008. Specifically, the ER records establish that the claimant denied any history of recent injury, denied falling, and reported that the back symptoms had been present for three days or a week prior to January 31. Similarly, on February 6, 2008, the claimant advised Dr. Johnson that he did not sustain any specific injury. Finally, the ALJ is persuaded that it is more probably true than not that any symptoms the claimant experienced while working were the natural and proximate result of his non-industrial degenerative back condition, not any work-related injury. Dr. Caton credibly opined that if the claimant's symptoms were aggravated by work, they should subside when the claimant was not working. However, as demonstrated by the claimant's testimony, his symptoms had not subsided at the time of the hearing in October 2008. To the contrary, the claimant testified that he was having trouble sleeping and desired additional medical treatment.

17. Evidence and inferences inconsistent with these findings are not found to be credible and persuasive.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY OF ALLEGED INJURY

The claimant alleges the evidence supports a finding that he sustained an injury to his low back and right hip while performing services arising out of and in the course of his employment as a QA technician. Specifically, the claimant asserts that the evidence proves it is more probably true than not that he slipped and twisted his back while carrying a tub of meat on January 31, 2008. The ALJ concludes the claimant failed to meet his burden of proof to establish that his back and hip condition were proximately caused by an injury arising out of and in the course of employment.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment and compensation were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Finding of Fact 16, the claimant failed to prove it is more probably true than not that his back condition was proximately caused by an injury arising out of and in the course of the employment. The ALJ has discredited the claimant's testimony that he slipped and twisted his back at work on January 31, 2008. The ALJ finds this testimony to be contradicted by the credible testimony of Ms. R, as well as the ER records and Dr. Johnson's February 6, 2008, office note. The ALJ has also credited the opinion of Dr. Caton that the claimant suffered from serious pre-existing degenerative spinal disease. Dr. Caton credibly opined that if the claimant's condition were aggravated by his employment she would expect it to subside after he quit working. However, the claimant's symptoms persisted at the time of the hearing. Consequently, it is more probably true than not that the claimant's symptoms are causally related to his pre-existing spinal disease than to the alleged work related injury.

In light of the finding that the claimant failed to prove a compensable injury, the ALJ need not address the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in W.C. No. 4-754-858 is DENIED and DISMISSED.

DATED: November 20, 2008 David P. Cain

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-759-706

ISSUES

¬ Did claimant prove by a preponderance of the evidence that he sustained an injury arising out of the course and scope of his employment?
¬ Did claimant prove by a preponderance of the evidence that he is entitled to temporary disability benefits from May 12, 2008, ongoing?

FINDINGS OF FACT

1. Claimant's date of birth is June 17, 1979; his age at the time of hearing was 29 years. Employer manufactures concrete pipe. Employer hired claimant to work as a concrete laborer on April 18, 2008. Claimant contends he injured his left knee from climbing and descending ladders on Tuesday, May 6, 2008.
2. On May 12, 2008, claimant sought treatment at the emergency room (ER) at Community Hospital, where Paul E. Numsen, D.O., examined his left knee. Claimant reported the following history of his symptoms:
3. [Claimant] for the last week has had progressive pain in his left knee. It seems to be hurting the most medially, he noticed 24 hours ago. It was swollen when he woke up. He denies any sort of injury.
4. Claimant did not report to Dr. Numsen any history of a work-related cause to his left knee condition. Upon physical examination, Dr. Numsen found moderate swelling. Dr. Numsen excused claimant from work for 2 days and referred him to Western Orthopedics for evaluation.
5. Upon referral from the ER, Orthopedic Surgeon Mitchell T. Copeland, D.O., evaluated claimant on May 14, 2008. Dr. Copeland noted that claimant's symptoms began insidiously over the prior week. Claimant did not report to Dr. Copeland any history of a work-related cause to his left knee condition. Dr. Copeland suspected an occult meniscal tear and recommended claimant undergo a magnetic resonance imaging (MRI) scan of his left knee. Dr. Copeland restricted claimant to sedentary work, with a 10-pound lifting restriction, no squatting, no climbing, and the ability to use crutches.

Restrictions imposed by Dr. Copeland prevent claimant from performing his regular job at employer.

6. Claimant testified that he experienced left knee swelling and pain at work on May 6, 2008. Claimant alike stated that he could not recall what work activity he was performing but that he had climbed up and down ladders that day. Claimant explained that he was climbing ladders on May 6th to place fiberglass cap rings on concrete pipe. Claimant said he had worked a 70-hour week by the end of the workweek on Friday May 9th. Claimant said he experienced slight pain and discomfort in his left knee that week.

7. Claimant testified that he telephoned employer on May 12, 2008, and told his supervisor, Gordon Horton, that he had left knee pain and could not come to work. While claimant testified he told Horton on May 12th that his knee condition might be work-related, this testimony lacks credibility because it is contrary to credible testimony from Horton and other coworkers. Claimant said that he is unable to afF the MRI and needs treatment.

8. Horton testified to the following: Horton supervised claimant's work and saw him on a daily basis while he was working. Claimant telephoned on the morning of May 12th and said his knee was swollen and painful. When Horton asked him if he hurt his knee on the job, claimant said he did not know how he had hurt it. Prior to May 12th, claimant neither reported knee pain to Horton nor said he could not work because of knee pain. Horton spoke with claimant on May 13th using a speakerphone, when claimant again told Horton he did not know how he hurt his knee. Claimant never reported to Horton that he hurt his knee while working for employer.

9. Claimant's coworker, David Hofferber, was present in the office on May 13th when Horton spoke with claimant on the speakerphone. Hofferber overheard Horton ask claimant how he hurt his knee and heard claimant respond that he was unsure how he hurt his knee. Hofferber's testimony supports Horton's testimony about the May 13th conversation with claimant.

10. Brian Muhr also was in the office on May 13th and overheard Horton's conversation with claimant on the speakerphone. Muhr overheard Horton ask claimant how he hurt his knee and heard claimant respond that he was unsure how he hurt his knee. Muhr's testimony supports that of Horton and Hofferber concerning claimant's May 13th admission that he was unaware how he hurt his knee.

11. Horton further testified: After he learned claimant reported an injury from climbing ladders on May 6th, Horton checked production sheets. The production sheets showed that May 6th production involved pulling pipe out of kilns. There was no pipe manufactured on May 6th, and claimant's duties did not involve climbing ladders to place pipe caps. Horton's testimony here was credible and persuasive.

12. Employer's Vice President of Finance, Royce Clement, testified to the following: On May 16th, claimant reported to Clement that he wanted to file a workers' compensation claim for his left knee. Claimant explained that he needed a MRI scan and could not afF to pay for it. Clement asked claimant three times how he hurt his knee at work. In the first two answers, claimant said he did not know how he hurt his knee at work. Clement pressed claimant by telling him he needed a reason why claimant thought his knee condition was work-related in order to file the Employer's First Report of Injury (E-1). In response, claimant said he must have hurt his knee climbing up and down lad-

ders. Clement filed an E-1 based upon what claimant reported. Clement's testimony is credible because it was consistent with that of Horton, Hofferber, and Muhr.

13. The Judge credits the testimony of Horton, Hofferber, and Muhr over that of claimant in finding no persuasive support for claimant's hunch that his left knee pain might be causally related to climbing up and down ladders on May 6th.

14. Clement referred claimant to employer's designated medical provider, Western Medical Associates, where Lynne Bigler, R.N., examined him on May 16th. Claimant reported to Nurse Bigler that he was unable to identify a specific injury but that his job involved a lot of climbing up and down ladders. On physical examination of claimant's knee, Nurse Bigler found swelling and decreased range of motion.

15. At respondents' request, Douglas C. Scott, M.D., performed an independent medical examination of claimant on September 24, 2008. Claimant told Dr. Scott he may have twisted his knee on May 6th while putting a cast iron cap ring atop a concrete pipe. Claimant told Dr. Scott he had no immediate pain from twisting his knee. The mechanism of injury claimant reported to Dr. Scott is markedly different from claimant's testimony at hearing. Claimant did not report to Dr. Scott any mechanism of injury from climbing up and down ladders. Crediting Horton's testimony, claimant's duties on May 6th did not involve climbing ladders to place cap rings. The history claimant gave Dr. Scott is unreliable and lacks credibility.

16. Dr. Scott assessed claimant with a possible meniscus tear and possible anterior cruciate ligament (ACL) insufficiency. Dr. Scott opined:

17. [T]his is usually related to a traumatic injury such as a forceful twisting of forceful valgus stress on the knee. If the meniscus is torn or if the ACL ligament is torn, the pain would have been immediate and he would have known that he injured his knee with some specific activity or work-related injurious exposure. [Claimant] gave no report of a specific traumatic event, incident, and/or injurious exposure at [employer]. As a result, there is no evidence supportive of a work-related injury to his left knee on or about May 6, 2008.

18. Based upon the history claimant gave of left knee pain and swelling when he awoke Saturday morning, Dr. Scott opined it likely claimant injured his knee Friday night (May 9th).

19. Dr. Scott testified as an Occupational Medicine Physician with expertise in determining causation of knee conditions. Dr. Scott listened to claimant's testimony at hearing. Based upon claimant's testimony, and based the history claimant gave the ER physician (Dr. Numsen), Dr. Scott opined it medically probable that claimant injured his knee within 24 hours of waking up on Sunday morning, May 11th. Dr. Scott explained that claimant reported to Dr. Numsen on May 12th that he experienced his first knee symptoms when he awoke Sunday morning with pain and swelling. This history was different from what claimant told Dr. Scott about waking with these symptoms on Saturday morning. Dr. Scott stated that claimant's presentation at the ER on May 12th was consistent with an acute left knee tear/injury within 24 hours of his waking with symptoms on Sunday morning. Dr. Scott opined that claimant more likely sustained an acute injury that resulted in immediate swelling and pain. Dr. Scott further stated that, had claimant acutely injured his knee either climbing ladders or placing the cast iron ring on pipes, he would have experience immediate symptoms and a functional inability to weight-bear, squat, or walk. Had claimant injured his knee on May 6th, he would not

have been able to work as he did on May 7th, 8th, and 9th. Dr. Scott's medical opinion was persuasive.

20. Claimant failed to show it more probably true than not: (a) That he injured his left knee while working for employer on May 6th; or (b) That his work activity at employer caused, aggravated, or reasonably accelerated his left knee injury. As found, claimant's testimony about how he injured his left knee lacks credibility. Crediting Dr. Scott's medical opinion, it is medically probable that claimant sustained an acute injury to his knee within 24 hours prior to presenting to the ER on May 12th. Claimant thus likely injured his knee on Sunday, May 11th. Crediting Dr. Scott's testimony, it is medically improbable that claimant's work caused, aggravated, or reasonably accelerated his left knee injury. Claimant thus failed to prove by a preponderance of the evidence that he sustained a compensable knee injury while working for employer.

CONCLUSIONS OF LAW

1. Claimant argues he has proven by a preponderance of the evidence that he sustained a left knee injury arising out of the course and scope of his employment. The Judge disagrees.

2. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing

disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

5. Here, the Judge found claimant failed to show it more probably true than not either that he injured his left knee while working for employer on May 6th or that his work activity at employer caused, aggravated, or reasonably accelerated his left knee injury. Claimant thus failed to prove by a preponderance of the evidence that he sustained a compensable knee injury while working for employer.

6. The Judge found claimant's testimony about how he injured his left knee lacked credibility when weighed against other credible or persuasive evidence. The Judge credited Dr. Scott's medical opinion in finding claimant likely injured his left knee on Sunday, May 11th, and in finding it improbable that claimant's work caused, aggravated, or reasonably accelerated his left knee injury.

7. The Judge concludes claimant's claim for workers' compensation benefits for his left knee should be denied and dismissed. In light of this finding, the Judge has not considered the remaining issues raised by claimant.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits for his left knee is denied and dismissed.

DATED: _November 21, 2008_ Michael E. Harr,

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-317

ISSUES

¬ Did claimant prove by a preponderance of the evidence that his average weekly wage should be increased to more fairly approximate his wage loss?

¬ Did respondents prove by a preponderance of the evidence that claimant willfully failed to obey a reasonable safety rule adopted by employer and that his compensation should be reduced by 50%?

FINDINGS OF FACT

1. Employer operates a grocery warehouse business. Claimant works for employer as an order selector. Claimant's supervisor is T. F. R. V is employer's Risk Manager. Claimant's job duties include operating a pallet jack inside the warehouse building while wearing a headset. Claimant sustained an admitted injury to his right-knee on March 29, 2008, when the pallet jack he was driving collided with a pallet jack driven by J. B. Co-employee, J. D, witnessed the accident.

2. On June 9, 2008, insurer filed a General Admission of Liability, admitting for an average weekly wage (AWW) of $705.53. Insurer calculated the AWW by averaging claimant's earnings over 13 weeks prior to the week ending on March 15, 2008. Insurer reduced claimant's compensation benefits by 50%, asserting claimant willfully violated a safety rule.

3. During calendar year 2007, claimant earned gross wages of $51,374.71, which reflects average weekly earnings of $987.98. F explained that claimant volunteered to work a lot of overtime during calendar year 2007 that is no longer available because employer hired more employees to reduce overtime hours. Claimant cannot reasonably expect to work as much overtime during calendar year 2008 as he worked in 2007. Thus, an average weekly wage based upon claimant's earnings during calendar year 2007 would not fairly approximate his wage loss from the injury in 2008.

4. Claimant earned $10,713.12 over the 14 weeks prior to the week ending March 29, 2008. During several of those weeks, claimant earned over $1,000.00 because of overtime he worked. Employer periodically requests that senior employees work fewer hours when business slows. Claimant answered employer's request to work fewer hours during the week ending February 22, 2008, when he earned $357.79. The wages claimant earned during the week ending February 22nd thus fail to approximate his wage loss from the injury. Subtracting claimant's earnings during the week ending February 22nd leaves gross earnings of $10,355.33 over 13 weeks ($10,713.12 - $357.79 = $10,355.33). The Judge thus finds it more probably true that an AWW of $796.56 more fairly approximates claimant's wage loss from the injury ($10,355.33 divided by 13 weeks equals $796.56).

5. On April 29, 2008, claimant reported to F that his knee was bothering him. F investigated the accident. According to F, claimant and D initially placed blame on B, saying that B ran into claimant's pallet jack. Claimant suggested that F watch the film from one of the surveillance cameras. F later concluded from his investigation that claimant was at fault for the accident.

6. F watched the film of the accident, which is no longer available. F believes the film showed that claimant negligently ran into B's pallet jack. According to F, the film showed the following: Claimant was standing on the warehouse floor and facing D while talking. Claimant then jumped onto his pallet jack and drove forward without looking where he was driving. The film has no sound track, so B could not tell from watching the film whether claimant honked the horn of his pallet jack when he started driving.

7. At F's behest, V also watched the film of the accident. V's testimony about what he saw on the film supports F's account. According to V, claimant negligently ran into B's pallet jack in the heaviest trafficked shipping corridor in the warehouse. V stated that, had claimant looked up when he started driving his pallet jack, he could have avoided the collision. V believes claimant violated safety rule numbers 23 and 33, which provide:

8. Failure to keep eyes on path when performing job, especially when driving, walking through wet or slippery floor hazards.

9. Negligence or carelessness in the use of any type of equipment or performing of work.

10. V stated that claimant would not admit that the collision was his fault.

11. It is more probably true that claimant was reasonably aware of employer's safety rules. Employer posts safety rules at the entrance to the warehouse, in the break room, and in the cafeteria. Supervisors hold bimonthly safety meetings to discuss safety issues with their team members. Claimant attended several safety meetings where the team discussed the following safety issue:
Travel & Traffic, Gotta Look first > Use Horns > move cautiously at aisle ends, doorways, blind spots!

12. The Judge adopts claimant's stipulation in finding that he was aware of the safety rules.
13. D provided F a written statement and also watched the film of the accident. The collision occurred where the end of Aisle 45 intersects the north/south traffic corridor. Crediting D's testimony, the Judge finds the following: Sitting in the north/south traffic corridor at the end of Aisle 45 were two pallets stacked with product. The two pallets were located in the northbound lane just north of the end of aisle 45. The two pallets obstructed the view of northbound operators. Northbound operators had to pull into the southbound lane to navigate around the two pallets. Around 5:00 p.m., claimant was northbound in the north/south traffic corridor headed to the north end of the warehouse to clock out. Claimant stopped to talk to D, who had parked his pallet jack within the end of Aisle 45. Claimant parked his pallet jack in the northbound lane of the north/south traffic corridor at the intersection of Aisle 45.
14. D testified that he observed the following at the time of the collision: Claimant stepped back onto his pallet jack and honked his horn as he started to pull into the southbound lane of the north/south traffic corridor. Because the two pallets obstructed their view, neither D nor claimant could see B driving his pallet jack southward in the southbound lane. Claimant collided with a pallet of product B was carrying on the rear forks of his pallet jack.
15. Claimant's testimony was consistent with that of D: Claimant stopped to tell D he would see him the following week. Claimant stepped onto his pallet jack and looked northward but the two pallets blocked his view. Claimant honked his horn and merged into the southbound lane. B's pallet jack struck claimant. Both B and D asked claimant if he was all right. Claimant answered, "No" as he grabbed his knee in pain. Claimant reported his injury to F at the beginning of the following workweek. F told claimant to take it easy on his knee. On April 29th, claimant requested that F to send him for medical care.
16. Claimant also saw the film, which he believes alike supports his and D's testimony. Claimant believes he exercised reasonable care under the circumstances. Claimant believes B was negligent because claimant had pulled his pallet jack completely into the southbound lane before B collided with his pallet jack.
17. The Judge credits the testimony of claimant and D as direct eyewitnesses to the collision. Both claimant and D described how the two pallets blocked their view looking north into the north/south traffic lane. Neither F nor V refuted that testimony or otherwise discussed how the pallets affected the safety of the northbound operators attempting to navigate around them. Although F and V describe a slightly different version of events based upon the film, D and claimant believe what the film depicts instead supports their version of the facts based upon what they witnessed. Because the film

lacked a sound track, the testimony of claimant and D stating that claimant honked his horn is unrefuted and credible.

18. Respondents failed to show it more probably true than not that claimant willfully violated the above quoted safety rules. It is more probably true that the collision occurred because someone other than claimant or D had blocked the northbound lane of the north/south traffic corridor with loaded pallets, creating an unsafe condition. The pallets obstructed claimant's view of the north/south traffic corridor. Claimant acted in a reasonably safe manner by honking his horn as he pulled into the southbound lane to navigate around the pallets. Crediting his testimony, claimant looked forward before pulling into the southbound lane and could not see B. B reasonably should have anticipated northbound drivers like claimant needing to pull into the southbound lane to navigate around the pallets. The collision could easily have been the result of B's negligence instead of claimant's. Crediting claimant's testimony, it is more probably true that, under the totality of the circumstances, claimant operated his pallet jack in a reasonably safe manner at the time B collided with him. There was no persuasive evidence otherwise showing claimant operated his pallet jack in a willfully negligent or willfully careless manner. Respondents thus failed to prove by a preponderance of the evidence that claimant willfully violated a safety rule.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

A. Average Weekly Wage:

Claimant argues he has proven by a preponderance of the evidence that his AWW should be increased to more fairly approximate his wage loss. The Judge agrees.

The Judge must determine an employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), *supra*, requires the JUDGE to base claimant's AWW on his earnings at the time of injury. Under some circumstances, the Judge may determine a claimant's TTD rate based upon his AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*, grants the Judge discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

Here, the Judge found it more probably true that an AWW of $796.56 more fairly approximates claimant’s wage loss from the injury. Claimant thus proved by a preponderance of the evidence that his AWW should be increased to $796.56.

As found, claimant cannot reasonably expect to work as much overtime during calendar year 2008 as he worked in 2007. Thus, an average weekly wage based upon claimant’s earnings during calendar year 2007 would not fairly approximate his wage loss from the injury in 2008.

As found, claimant earned $10,713.12 over the 14 weeks prior to the week ending March 29, 2008. During several of those weeks, claimant earned over $1,000.00 because of overtime he worked. The Judge however found that the $357.79 in wages claimant earned during the week ending February 22nd failed to fairly approximate his wage loss from the injury. The Judge calculated claimant’s AWW based upon earnings of $10,355.33 divided by 13 weeks.

The Judge concludes that insurer should pay claimant compensation benefits based upon an AWW of $796.56.

B. Safety Rule:

Respondents argue they have proven by a preponderance of the evidence that claimant willfully failed to obey a reasonable safety rule adopted by employer and that his compensation should be reduced by 50%. The Judge disagrees.

Sections 8-42-112(1)(a) and (b), *supra*, provide a 50% reduction in compensation where respondents prove either that claimant's injury was caused by the willful failure to use safety devices provided by the employer or that the injury resulted from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. The safety rule penalty is only applicable if the violation is willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intention. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Stockdale v. Industrial Commission*, 232 P. 669 (Colo. 1925); *Brown v. Great Peaks, Inc.*, W.C. No. 4-368-112 (Industrial Claim Appeals Office, July 29, 1999). Respondents satisfy the burden by showing that the employee knew of the rule yet intentionally performed the forbidden act; respondents need not show that the employee, having the rule in mind, determined to break it. *Stockdale v. Industrial Commission*, 76 Colo. 494, 232 P. 669 (1925).

A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

The Judge found that respondents failed to show it more probably true than not that claimant willfully violated the above quoted safety rules. Respondents thus failed to prove by a preponderance of the evidence that claimant willfully violated a safety rule.

The Judge instead found it more probably true that the collision occurred because of an unsafe condition where someone other than claimant or D had blocked the northbound lane of the north/south traffic corridor with loaded pallets. The pallets obstructed claimant’s view of the north/south traffic corridor.

The Judge credited claimant’s testimony in finding: Claimant acted in a reasonably safe manner by honking his horn as he pulled into the southbound lane to navigate around the pallets. Claimant looked forward before pulling into the southbound lane and could not see B. B reasonably should have anticipated northbound drivers like claimant needing to pull into the southbound lane to navigate around the pallets. The collision could easily have been the result of B’s negligence instead of claimant’s.

The Judge found that, under the totality of the circumstances, claimant operated his pallet jack in a reasonably safe manner at the time B collided with him. There was no persuasive evidence otherwise showing claimant operated his pallet jack in a willfully negligent or willfully careless manner. Respondents thus failed to prove by a preponderance of the evidence that claimant willfully violated a safety rule.

The Judge concludes that respondents request for a 50% reduction of claimant's compensation benefits for allegedly violating a safety rule should be denied and dismissed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall pay claimant compensation benefits based upon an AWW of $796.56.

2. Respondents request for a 50% reduction of claimant's compensation benefits for allegedly violating a safety rule is denied and dismissed.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _November 18, 2008 Michael E. Harr,

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-477

ISSUES

The issues to be determined are:

1. Compensability.
2. Temporary Disability Benefits from May 19, 2008 and ongoing.
3. Medical benefits, specifically, treatment for Claimant's right shoulder including but not limited to an MRI and physical therapy.
4. Stipulation to an average weekly wage of $385.00.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds the following findings of facts:

1. Claimant began working with Respondent-Employer on July 15, 2007. She was employed as a security guard. Part of her duties as a security guard were to make sure the premises of Penrose Hospital were secure and also to perform watches for people requiring special attention. The purpose of a watch was to aid a person who might be intoxicated and who might need protection from himself or herself or protection for the medical staff.

2. Claimant began working her shift May 18, 2008 at midnight and was on duty until 8:00 a.m. on May 18, 2008. During that time, she made rounds of various areas of the hospital. Claimant was in room 19 in the emergency room (ER) beginning shortly after midnight and then continuing until around 5:15 a.m. for a watch. At 5:15 a.m. the person in room 19 was transported to detox and the watch ended.

3. At that time, the Claimant began to patrol various areas of the hospital. Around 6:00 a.m., she was patrolling the ER when she heard loud yelling and screaming coming from the down hall. She walked down the hall to room 19. She saw what appeared to her to be a female patient, in her mid to late teens, lying in the bed. When the patient made eye contact with Claimant, the patient rolled off the bed. Claimant rushed into the room to help lift this patient back onto the bed. Claimant believed the patient's sister was also in the room and the sister helped lift the patient back onto the bed. Claimant used her right arm to help lift the patient.

4. As Claimant was lifting the patient back onto the bed, she felt a tearing and burning sensation in her right shoulder. Not wanting to drop the patient, she switched to the left arm in which she was able to lift the patient into bed. Claimant had shouted out for help when she entered the patient's room. When Claimant was leaving the room Penrose employee Michelle McHugh was coming into the room. Claimant put up the rails to the patient's bed but the patient was sliding down the bed. After Ms. McHugh entered the room she slid the patient up into the bed.

5. Claimant then told the patient's nurse what had happened. And then feeling pain to her shoulder, she spoke to Security Officer James Forrest who was manning the ER entrance. Claimant told Mr. Forrest of her injury and he volunteered to help her fill out any paper work that she might have. Claimant also tried to call her supervisor John Burdan, who told her to "stand by" which means "don't talk to him right now."

6. Around 6:30 a.m., Claimant went to the General Security Office and informed Mr. Burdan of her injury and then she filled out a Worker's Compensation Claim Form. Another supervisor of Claimant, Terri Soto, came on duty at 7:30 a.m. and sent Claimant directly to the ER, against her wishes, and after going to the emergency room for treat-

ment and being released from the ER with her arm in the sling, Claimant met with Ms. Soto to help with any additional paperwork.

7. Claimant was then sent to the workers' compensation doctor at Concentra the next day. The assessment at that time was a rotator cuff strain and rotator cuff tear. The Claimant was told she needed an MRI of her right shoulder and she was to be placed on modified activity with no use of the right arm.

8. After the appointment with Concentra, the Claimant returned to her employer asking for work, and she was told there was no job for her if she could not use her arm. Claimant has not worked since the date that she was injured. It was her understanding that she was on administrative leave and, therefore, she was unable to return to work. Respondent-Employer has not offered claimant employment since the day she was injured.

9. Claimant had an appointment with Dr. Susan Malis at Concentra on July 28, 2008, in which the assessment was a "rotator cuff strain" and she recommended reopening the case due to continuous aspects of impingement and referred Claimant to physical therapy at that time, and if there was no relief, an orthopedic consult. Claimant also went for another follow-up appointment on August 11, 2008, in which there was a similar assessment and a request for an MRI. Claimant was told by the doctor at Concentra that they would not be able to do anything unless an MRI was ordered so they could figure out what was going on inside her shoulder.

10. Claimant sustained a rotator cuff strain or tear to her right shoulder. The objective findings are consistent with the mechanism of injury. Claimant needs physical therapy, an MRI and, possibly an orthopedic evaluation to look at the shoulder.

11. Claimant is still an employee of Respondent-Employer and on administrative leave.

12. Claimant injured her right shoulder in the course and scope of her employment. Claimant's statement that she injured herself while lifting the patient has been consistent throughout the case.

13. The ALJ finds that Claimant is credible and that she was injured in the course and scope of her employment on May 18, 2008. The authorized treating physician gave Claimant restrictions and the Respondent-Employer has failed to offer her modified duty to fit within those restrictions. The ALJ further finds that Claimant needs medical benefits to treat her right shoulder.

CONCLUSIONS OF LAW

10. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2007), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), C.R.S. (2007). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. (2007). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. (2007).

11. In accordance with Section 8-43-215, C.R.S. (2007), this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

12. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

13. Claimant in this matter has the burden of proof of showing by a preponderance of the evidence that she was injured in the course and scope of her employment on May 18, 2008, which led to the injuries of which she now complains. The ALJ finds the Claimant has met her burden of proof showing the injury to her right shoulder is work related. The ALJ concludes that the Claimant is credible. Claimant's reports regarding how she was injured were consistent from the time she first reported her injury and throughout.

14. C.R.S. Section 8-42-101, C.R.S. (2007) provides that employers shall provide those medical benefits as may be reasonably necessary to cure and relieve the employee from the effects of an industrial injury. Claimant sustained a rotator cuff strain or tear to her right shoulder. The objective findings are consistent with the mechanism of injury. Claimant needs physical therapy, an MRI and possibly an orthopedic evaluation to look at the shoulder. Thus, the ALJ finds that the Respondents are responsible for the payment of these medical benefits.

15. Claimant seeks temporary total disability benefits for the period of time that she was unable to work, from the time she was injured on May 18, 2008 and ongoing until terminated by law. Claimant went back to work on May 19, 2008, and was told they could not provide a position for her if she was unable to use her right arm. Claimant is still an employee of Respondent-Employer and on administrative leave. Claimant has not received any income and was unable to work or receive unemployment benefits

since the time that she was injured. Respondents are responsible for the temporary total disability benefits from the first day of work that she was out because of her injury, May 19, 2008 and ongoing until terminated by law.

16. Respondents are responsible for payment of temporary total disability payments to Claimant from May 19, 2008 and ongoing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.
2. Respondent-Insurer shall pay for Claimant's reasonable and necessary medical care to cure or relieve her from the effects of the injury to her right shoulder area, including but not limited to, the treatment recommended as found above.
3. Respondent-Insurer shall pay Claimant temporary total disability benefits from May 19, 2008 and ongoing until terminated by law.
4. Respondent-Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

DATE: November 14, 2008

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-110

ISSUES

The issues litigated before the ALJ include compensability, medical benefits, and temporary total disability benefits. Based upon the finding herein that the claim is not compensable the ALJ does not address the additional issues.

FINDINGS OF FACT

1. Claimant sustained a fall while at work for the Respondent-Employer while she was walking to the restroom from her workstation. Claimant unequivocally states that she did not see what, if anything, made her fall. Claimant stated to her supervisor that she slipped off her shoe causing the fall. Claimant at hearing indicated that she was just guessing as to what may have caused her fall.
2. Subsequent investigation revealed there were no defects in the carpet in the area where the Claimant fell. Additionally, no objects or spilled liquids or materials were found in the vicinity of the fall.

3. Claimant bears the burden of proof to establish she sustained a compensable injury. Claimant's evidence consistently establishes that she does not know what caused her to fall. Her testimony that she was guessing at what may have caused her fall is speculative and not sufficient to establish compensability. Claimant's fall is unexplained.

CONCLUSIONS OF LAW

1. Burden of proof. Claimant has the burden of proving a compensable injury and entitlement to benefits. Sections 8-41-301 and 8-43-201, C.R.S. The WCA has no "presumption of compensability"; instead, WCA cases are to be decided on their merits. Section 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether a claimant has met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*, (threshold issue of compensability is question of fact for ALJ).

Generally, WCA claims and affirmative defenses must be established by a preponderance of evidence. A "preponderance of evidence" is that which leads the prior-of-fact after considering all evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.306, 592 P2d 792 (1979).

2. Specific Findings and Conclusions. This decision does not specifically address every item contained in the record. In accordance with Section 8-43-215, C.R.S., this decision contains Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). When the testimony of a witness contains internal inconsistencies or conflicts, an ALJ must resolve them, and may do so by crediting part or none of the witness's testimony. *See In re Gorsuch*, W.C. No. 4-588-229 (ICAO, 7/18/2005) and *In re Lang*, W.C. No. 4-450-747 (ICAO, 5/16/2005), both citing *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). The ALJ has not addressed and is not required to address every piece of evidence or possible inference in rendering a decision. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Offic*e, 5 P.3d 385 (Colo.App. 2000). Thus, to the extent that there conflicts arising from the testimony of the various witnesses, the findings of fact have resolved those conflicts by making appropriate credibility determinations.

3. In this case, the preponderance of the evidence shows that Claimant was injured when she fell while walking to the restroom at work. Claimant has the burden of proof to establish compensability; however, she was unable to pinpoint any mechanism, object, or condition of the premises as causing her to fall. Additionally, subsequent investigation by the Respondent-Employer revealed no mechanism, object, or condition of the premises. Claimant's evidence consistently establishes that she does not know what caused her to fall. Her testimony that she was guessing at what may have caused her fall is speculative and not sufficient to establish compensability. No special hazards

of employment were implicated in Claimant's injury and none are found by the ALJ. Claimant's fall is unexplained. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *Rice v. Dayton Hudson Corporation*, W.C. No. 4-386-678 (July 29, 1999).

ORDER

It is therefore ordered that:

Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

DATE: November 26, 2008

Donald E. Walsh
OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-761-823

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable industrial injury to his left shoulder during the course and scope of his employment with Employer on June 1, 2008.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury.

STIPULATIONS

1. The parties agreed that the following entities were authorized medical care providers: (1) Centura Health/Porter Adventist Hospital; (2) HealthOne Occupational Medicine; (3) John W. Dunkle, M.D.; (4) Robert S. Campbell, PA-C; (5) Steve Horan, M.D. and (6) Orthopaedic Physicians of Colorado, P.C.

2. The parties agreed that June 1, 2008 was the last day that Claimant worked for Employer.

FINDINGS OF FACT

1. Claimant is a 54 year-old male who worked for Employer as a deli chef. He began working for Employer in June of 1989. Claimant's job duties included mixing meatloaf, chopping vegetables, cooking pasta, slicing meat, washing dishes and lifting pots and pans.

2. On July 2, 2008 the parties in the present matter proceeded to hearing in Workers' Compensation case number 4-740-420 before the undersigned ALJ. Claimant asserted that he suffered an occupational disease to his right shoulder during the course and scope of his employment with Employer. On August 11, 2008 the undersigned ALJ

entered Findings of Fact, Conclusions of Law and Order. The ALJ concluded that Claimant failed to establish by a preponderance of the evidence that he sustained an occupational disease to his right shoulder during the course and scope of his employment with Employer. Claimant's right shoulder condition was not caused, accelerated, intensified or aggravated by his duties for Employer. The undersigned ALJ thus denied and dismissed Claimant's request for Workers' Compensation benefits.

3. In the present matter, Claimant credibly testified that at approximately 2:00 p.m. on June 1, 2008 he was performing his job duties in a walk-in refrigerator. He reached overhead with his arms to remove a box of vegetables from a shelf that was approximately six to seven feet high off the refrigerator floor. As Claimant pulled out the box of vegetables, another box fell off the shelf towards him. The falling box weighed approximately five pounds. Claimant immediately reacted by fully extending his left arm upwards approximately four to six inches in order to deflect the falling box. Although Claimant successfully deflected the box, he experienced immediate severe pain in his left shoulder.

4. Claimant explained that his supervisor, deli-assistant store manager Amanda Becker, was standing near him in the walk-in refrigerator when the incident occurred. He told her that he had injured his shoulder.

5. After the incident, Claimant left the walk-in refrigerator and filled out paperwork for about 20 minutes. He continued to experience pain in his left shoulder and could not raise his left arm without pain.

6. While completing paperwork Claimant heard an announcement on Employer's public address system that directed him to report to the store office. Claimant arrived at the office between 2:20 and 2:30 p.m. The assistant store managers were present and Claimant reported his left shoulder injury. Because the incident occurred on a Sunday, the assistant store managers instructed Claimant to report to the Emergency Room at Centura Health/Porter Adventist Hospital for medical treatment.

7. Claimant subsequently visited the emergency room at Porter Adventist Hospital. Andrew L. Knaut, M.D. diagnosed Claimant with a probable left shoulder ligamentous injury.

8. On June 2, 2008 Claimant obtained authorized medical treatment from HealthOne Occupational Medicine and Rehabilitation. Robert S. Campbell, PA-C examined Claimant and determined that he had suffered a work-related left rotator cuff tear. He stated that Claimant could return to work with restrictions that included no use of his left arm and wearing a splint "except for gentle range of motion and stretching." PA-C Campbell expected Claimant to reach Maximum Medical Improvement (MMI) within six months if surgery was required.

9. On June 6, 2008 Claimant underwent an MRI of his left shoulder. The MRI revealed that Claimant suffered primarily from a bursal surface tear, but

also had a partial full thickness tear, of his left shoulder. The tear was "possibly acute."

10. Claimant was subsequently referred to Steven E. Horan, M.D. at Orthopaedic Physicians of Colorado. Based on the rotator cuff tear, Dr. Horan recommended surgical intervention.

11. Henry J. Roth, M.D. testified at the hearing in this matter. He explained that Claimant's left shoulder MRI was similar to the MRI findings in Claimant's right shoulder. Dr. Roth stated that both shoulders had downsloping acromioms, AC joint arthrosis, spurring and other degenerative findings. He commented that, because of Claimant's downsloping acromiom, spurring and AC joint arthrosis, he expected Claimant to have a left rotator cuff tear. Dr. Roth thus concluded that a natural degenerative condition caused Claimant's left rotator cuff tear.

12. Nevertheless, Dr. Roth further testified that Claimant's degenerative condition did not necessarily cause his rotator cuff tear. He also acknowledged that an individual with similar degenerative findings might never develop a rotator cuff tear. Moreover, Dr. Roth testified that he could not exclude the possibility that Claimant's left shoulder rotator cuff injury was caused by a sudden, acute event as described by Claimant.

13. Claimant has established that it is more probably true than not that he suffered an industrial injury to his left shoulder during the course and scope of his employment with Employer on June 1, 2008. Claimant credibly explained that, as he pulled a box of vegetables from a shelf in a walk-in freezer, another box fell off the shelf towards him. Claimant reacted by fully extending his left arm upwards approximately four to six inches in order to deflect the falling box. He immediately experienced pain in his left shoulder and suffered a rotator cuff tear. Although Dr. Roth explained that Claimant's rotator cuff tear was caused by a natural degenerative condition, he acknowledged that an individual with Claimant's MRI findings might never develop a rotator cuff tear and could not exclude the possibility that Claimant's injury was caused by a sudden, acute event. Claimant has thus demonstrated that the June 1, 2008 incident aggravated, accelerated, or combined with his pre-existing, degenerative left shoulder condition to produce a need for medical treatment.

14. Claimant has demonstrated that it is more probably true than not that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his left shoulder rotator cuff tear. Claimant's need for medical treatment subsequent to June 1, 2008 was designed to alleviate the effects of his left rotator cuff tear.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner, 12 P.3d at 846.*

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he suffered an industrial injury to his left shoulder during the course and scope of his employment with Employer on June 1, 2008. Claimant credibly explained that, as he pulled a box of vegetables from a shelf in a walk-in freezer, another box fell off the shelf towards him. Claimant reacted by fully extending his left arm upwards approximately four to six inches in order to deflect the falling box. He immediately experienced pain in his left shoulder and suffered a rotator cuff tear. Although Dr. Roth explained that Claimant's rotator cuff tear was caused by a natural degenerative condition, he acknowledged that an individual with Claimant's MRI findings might never develop a rotator cuff tear and could not exclude the possibility that Claimant's injury was caused by a sudden, acute event. Claimant has thus demonstrated that the June 1, 2008 incident aggravated, accelerated, or combined with his pre-existing, degenerative left shoulder condition to produce a need for medical treatment.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his left shoulder rotator cuff tear. Claimant's need for medical treatment subsequent to June 1, 2008 was designed to alleviate the effects of his left rotator cuff tear.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable left shoulder rotator cuff tear on June 1, 2008.

2. Respondent shall pay all of Claimant's reasonable and necessary medical expenses from his authorized providers as stipulated by the parties. Respondent shall also provide Claimant additional authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his work-related injury.

3. Any issues not resolved by this Order are reserved for future determination.

DATED: November 20, 2008.

_____
Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-762-496

ISSUES

The sole issue determined herein is compensability.

FINDINGS OF FACT

1. Claimant was employed as a guide setter. He was responsible for set up to guide pieces of production steel to the next station on the production line. He had to straighten pieces with a sledgehammer. Claimant worked the night shift from 7:00 p.m. to 7:00 a.m.

2. Claimant has been a weight lifter for many years.

3. In January 2006, claimant sought care from his personal physician, Dr. King, due to left shoulder pain that he had experienced for years.

4. On August 15, 2006, Dr. King reexamined claimant, who reported two weeks of left shoulder pain after lifting a cherry picker with his son.

5. On October 15, 2007, Dr. Rowland examined claimant, who reported a history of one and one-half years of left shoulder pain.

6. On May 20, 2008, claimant informed Mr. M, the Production Supervisor, that he had a "kink" in his neck from using a pry bar to try to free up a stuck wedge.

7. On May 20, 2008, Dr. King reexamined claimant, who reported a history of ten days of right shoulder and neck pain. Claimant reported that the previous left shoulder pain from 2006 and 2007 had resolved. Dr. King prescribed Norflex and instructed claimant to continue to use naproxen.

8. Claimant alleges that he suffered a work injury on May 27, 2008 at approximately 4:00 a.m., while hitting a rail with a 12-pound sledgehammer. Claimant had to work in a confined space and had to swing the sledge right-handed only from shoulder height to

approximately knee height. Claimant alleges that after about six swings, he suffered right shoulder pain.

9. Claimant did not report a work injury, but continued to work his normal job duties for the rest of his shift.

10. Claimant went home to rest. At about 1:00 p.m., he sought treatment at the emergency room. Claimant reported that he thought that his "rotator cuff is shot." Claimant reported a history of right hand numbness and increased pain over three weeks. Claimant reported that he had been receiving cortisone shots from Dr. King.

11. After being released from the emergency room, claimant called Mr. O, his foreman, and told him that he would be unable to return to work. Mr. O told claimant to call Mr. M. Claimant called Mr. M and reported that he had neck problems, but he did not report any work injury.

12. On May 28, 2008, Dr. Nakamura examined claimant, who reported two years of right shoulder pain and receiving three injections. Claimant did not report suffering any work injury the previous day. Dr. Nakamura referred claimant for a magnetic resonance image ("MRI").

13. On May 29, 2008, claimant took the documentation to Mr. M, but he still did not report that he had been injured using the sledge.

14. The June 3, 2008, MRI showed a probable right shoulder rotator cuff tear.

15. On June 16, 2008, the employer completed the first report of injury, stating that claimant had reported a May 27 injury to his neck using the pry bar and then reported shoulder pain on May 29.

16. On June 20, 2008, Dr. Nakamura reexamined claimant, who reported a history of many months of right shoulder pain.

17. On June 28, 2008, claimant returned to the emergency room and reported shoulder pain for two years, with worsening for three weeks and radiating to the left shoulder.

18. On July 22, 2008, Dr. Ramos performed surgery to repair the right rotator cuff tear.

19. On September 5, 2008, Dr. Hall performed an independent medical examination ("IME") for claimant. Claimant reported a history of no prior right shoulder problems, although he did report seeing Dr. King one week before the alleged work injury. Dr. Hall noted that he did not have the May 20 notes from Dr. King, but those would be important. Dr. Hall concluded that the reported mechanism of injury was consistent with a work injury to the rotator cuff.

20. On September 30, 2008, Dr. Ridings performed an IME for respondents. Claimant denied any prior right shoulder treatment, although he did mention the May 20 treatment by Dr. King. Dr. Ridings concluded that the injury was not a work-related injury on May 27, 2008. Dr. Ridings noted that the records of Dr. King showed right shoulder symptoms on May 20 and that the reported mechanism of injury was not consistent with a rotator cuff tear.

21. At hearing, Dr. Ridings explained that rotator cuff tears typically occur when the shoulder is forced back down after being abducted and externally rotated or they occur from lifting over 90 degrees. Claimant's reported mechanism of using the sledge did not involve either likely cause for a cuff tear. Dr. Ridings noted that claimant tore his rotator cuff prior to the May 20 appointment with Dr. King. Dr. Ridings noted that, once claimant tore the cuff, any use of the shoulder would cause pain, but it would not cause injury.

22. Claimant has failed to prove by a preponderance of the evidence that he suffered an accidental injury to his right shoulder on May 27, 2008, arising out of and in the course of his employment. The opinion evidence from Dr. Ridings is credible and persuasive. The reported mechanism on May 27 would not be expected to cause a rotator cuff tear, although it would cause pain from the preexisting tear. Claimant already had torn his cuff as of May 20, causing him to seek treatment from Dr. King on that date. He failed to report any work injury on the day in question. He also failed to report any work injury to the medical providers on May 27 and May 28, 2008. Claimant's testimony that his only symptoms on May 20 were neck pain and headaches is not credible.

CONCLUSIONS OF LAW

Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, claimant has failed to prove by a preponderance of the evidence that he suffered an accidental injury

to his right shoulder on May 27, 2008, arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits is denied and dismissed.

DATED: November 10, 2008 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-299

ISSUES

The issue to be determined by this decision is the following:

1. Compensability

PROCEDURAL MATTERS

Claimant's Exhibits 1-3 were admitted into evidence. Respondents' Exhibits A-H were admitted into evidence.

The parties reached the following stipulations:

1. If the claim is found compensable, Respondents will pay Claimant TTD from June 26, 2008 through July 17, 2008.

2. Claimant's average weekly wage is $421.69.

3. Respondents referred Claimant to Dr. Denzel at Greeley Quick Care. Respondents will pay the expenses at Greeley Quick Care and Dr. Denzel.

4. If the claim is found compensable, Respondents will pay the expenses at Sunrise Community Health Center.

5. Claimant will choose an authorized treating physician through negotiation with Respondents.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. Claimant was employed as a yardman with Employer on May 29, 2008. His job duties included loading, unloading and assembling products. Claimant was required to lift 5 lbs. to 200 lbs. The job was physically demanding and claimant was typically sore at the end of a workday.

2. Claimant testified that on May 29, 2008 he unloaded 154 bales of alfalfa with two other workers. Following the unloading of the alfalfa, Claimant testified that he then unloaded and stacked straw. Claimant alleges he sustained a right shoulder injury performing this work.

3. Claimant initially testified that he did not report the shoulder injury until one month later, on approximately June 25, 2008 because he did not realize he was injured. Claimant thought he had the normal aches and pains from a hard day at work. When the symptoms did not improve he allegedly reported the injury. However, on cross-examination Claimant testified that he answered interrogatories stating that he reported the shoulder injury to his supervisor on May 29, 2008.

4. Claimant testified at hearing that he began taking Advil following May 29, 2008. When his pain was not relieved he requested that he be seen by a workers' compensation doctor. He was sent to Dr. Denzel by his employer. Claimant testified that he reported the injury in writing on June 25, 2008. However, the only written report of injury is dated June 27, 2008 on which date claimant authored a noted stating that he injured his right shoulder on May 29, 2008 during work at which time he advised his supervisor M. *Respondents' Exhibit H.*

5. Claimant agreed there was a tornado in the Greeley-Windsor area in late May 2008. Following the tornado, his roof needed to be re-shingled. Claimant denied doing the work himself. Claimant alleges the heavy work was done by his son-in-law and that Claimant did not do the work. Claimant denies telling anyone he was injured while shingling his roof.

6. Mr. B was not present on the day of Claimant's alleged injury. Mr. B returned to work on or about June 3, 2008. He did notice that Claimant was favoring his shoulder. When he inquired what was wrong, Claimant told him he had been working on his own roof that weekend and his shoulder was sore. Claimant did not mention a shoulder injury again until June 25, 2008. Mr. B testified that Claimant was able to complete his normal work duties and did not appear to have any problems using his shoulder.

7. Mr. W testified that between May 29, 2008 and June 25, 2008 Claimant did not complain of shoulder pain. Mr. W was working with Claimant on the date of the alleged injury. Claimant did not report shoulder pain and did not mention a shoulder injury while unloading bales of alfalfa and stacking straw. Claimant did not appear to have any prob-

lems while working. Claimant continued to work his regular job duties that required heavy lifting on a daily basis.

8. Mr. W testified that they did not unload the bales of alfalfa and straw on the same day. They were unloaded on different days. Mr. W testified further that Claimant was working with heavy tarps weighing 50-60 lbs. on or around June 13, 2008. Claimant did not complain of shoulder pain or exhibit any noticeable difficulties.

9. Mr. M testified that Claimant did not work on June 24, 2008. When Claimant reported to work on June 25, 2008 he informed Mr. M that he had injured his shoulder unloading alfalfa in May 2008 and wanted to see a doctor. Mr. M testified further that the unloading and stacking of alfalfa and hay did not occur on the same day as alleged by Claimant.

10. The testimony of M, W and B is found persuasive and credible. Claimant did not sustain an injury while in the course and scope of employment with Employer.

11. The testimony of Claimant is not credible or persuasive. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment with Employer.

CONCLUSIONS OF LAW

1. A claimant is required to prove that an injury arose out of and in the course of the claimant's employment. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. Ct. App. 2000). To prove compensability, a claimant must show both an "accident" and resulting "injury." Accident refers to an "unexpected, unusual or undersigned occurrence." Colo. Rev. Stat. § 8-40-201(1) (2007). In contrast, "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits flow to the victim of an industrial accident unless an "accident" results in a compensable "injury." Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H&H Warehouse v. Victory*, 805 P.2d 1167, 1169 (Colo. Ct. App. 1990). All other "accidents" are not compensable injuries. *Ramirez v. Safeway Steel Prods. Inc.*, W.C. No. 4-538-161 (I.C.A.O. Sept. 16, 2003).

2. Arising out of employment requires the claimant to prove "a causal connection between the employment and injuries such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). Course of employment refers to the time, place and circumstances of the claimant's injury. *Wild West Radio, Inc. v. Indus. Claim Appeals Office*, 905 P.2d 6 (Colo. Ct. App. 1995).

3. It is claimant's burden to prove by a preponderance of the evidence that he was injured in the course and scope of employment. Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. V. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

4. Claimant has failed to prove by a preponderance of the evidence that he was injured in the course and scope of employment. Cory W credibly testified that in June 2008 claimant told him he had been working on his roof. It was after this activity that Claimant began complaining of shoulder pain. Claimant worked from May 29, 2008 through June 25, 2008 and did not mention a shoulder injury while unloading bales of alfalfa and straw. Claimant continued to work his regular job that required daily heavy lifting. Claimant did not appear to have any problem with his right shoulder during this time.

5. Troy B credibly testified that Claimant told he had been working on his roof over the weekend and injured his shoulder.

6. Claimant testified that he unloaded many bales of alfalfa and straw back to back on May 29, 2008. However Cory W and Robert M testified credibly that the alfalfa and straw were unloaded on different days. Claimant initially testified that he reported the injury on May 29, 2008. On cross-examination claimant admitted that he stated in his answers to interrogatories he did not report the injury until June 25, 2008. Claimant's testimony is not credible or persuasive. He has failed to sustain his burden of proof to show by a preponderance of the evidence that he was injured in the course and scope of his employment.

ORDER

IT IS, THEREFORE, ORDERED THAT Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: November 25, 2008 Barbara S. Henk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-892

ISSUES

The sole issue determined herein is compensability.

FINDINGS OF FACT

1. Claimant was employed as a slot attendant for the employer.
2. On September 12, 2006, claimant sought treatment from his personal physician, Dr. Jensen-Fox, due to hearing loss and tinnitus. On November 6, 2006, Dr. Jensen-Fox reexamined claimant, who complained of hearing loss, tinnitus, and two days of nausea, dizziness, and diarrhea.
3. On November 8, 2006, claimant was found sitting on the bench in the employee locker room. He had complained previously of an upset stomach.
4. On November 15, 2006, Dr. Jensen-Fox diagnosed vertigo and noted that claimant's brain magnetic resonance image ("MRI") was normal.
5. On June 19, 2008, claimant was working the 8:00 a.m. to 4:00 p.m. shift for the employer. Claimant felt ill and told Mr. B that his stomach was upset. Claimant went to the public restroom in the employer's premises. Claimant believed the time was approximately 10:00 a.m. As a matter of fact, the time was much later. Claimant alleges that his right foot slipped out from under him and he fell straight onto his back and head.
6. Mr. B, the lead security person on June 19, 2008, answered a radio call about claimant being found on the floor. He found claimant lying on his back with his arms and legs perfectly straight. Claimant was mumbling incoherently. Mr. B found no moisture on the floor around claimant. Mr. B remained with claimant until the emergency medical technicians ("EMTs") arrived. At that time, claimant moaned in pain when he was loaded on a backboard.
7. Mr. S, a key manager, went to the restroom and found claimant lying on his back with his arms rigid, unresponsive, and mumbling. Mr. S found no substance on the floor around claimant.
8. Mr. M, another key manager, went to the restroom and found claimant lying on his back "at attention." Mr. M found no substance on the floor around claimant.
9. The EMTs arrived at 1:30 p.m. and transported claimant to the emergency room. At the hospital, clamant reported a history of slipping in the restroom and suffering pain to his back and to the back of his head. Claimant underwent computerized tomography ("CT") scans of his head and neck and x-rays of his low back. The physician diagnosed back contusion, muscle spasm, and mild concussion.
10. Claimant reported his injury as a work-related injury. The employer referred him to Dr. Wever. On June 23, 2008, Dr. Wever examined claimant, who reported the history of the slip and fall in the restroom. Dr. Wever diagnosed whiplash and minor concussion. He excused claimant from work for one week and referred him to physical therapy. Claimant attended one therapy session and then stopped going.
11. Claimant canceled his June 30, 2008, reexamination by Dr. Wever. He failed to set another appointment. Eventually, the respondents set a new appointment date of July 18, 2008.
12. In the meantime, the employer terminated claimant's employment on July 11, 2008.
13. On July 18, 2008, Dr. Wever reexamined claimant and noted that he suspected secondary gain. Dr. Wever requested that the physical therapist resume treatment of claimant. Dr. Wever excused claimant from work through July 25.

14. On July 25, 2005, Dr. Wever reexamined claimant and concluded that he thought that claimant was legitimately hurt in the described incident. He noted that the x-rays showed chronic changes in the back. He referred claimant to Dr. Oliveira, a neurologist.

15. On August 4, 2008, Dr. Rook performed an independent medical examination ("IME") for claimant. Claimant reported the history of the slip and fall. Dr. Rook diagnosed posttraumatic headache, cervical strain, left sacroiliac joint strain, cognitive complaints, and sleep disturbance.

16. On August 5, 2008, Dr. Oliveira examined claimant, who provided the history of the slip and fall. Dr. Oliveira diagnosed typical posttraumatic headaches and low back pain with probable left S1 radiculopathy.

17. An August 12 brain MRI showed mild deep white matter ischemic changes. A lumbar MRI showed disc bulges at all levels with no neurological impingement.

18. On September 3, 2008, Dr. Hammerberg performed an IME for respondents. He diagnosed posttraumatic headache, cervical strain, and lumbar strain. He recommended ear, nose, and throat ("ENT") evaluation with vestibular testing.

19. On September 17, 2008, Dr. Lipkin, an otolaryngologist, examined claimant, who reported a two-year history of hearing loss and tinnitus with no vestibular symptoms. Dr. Lipkin concluded that the alleged work injury did not cause any change in ENT status.

20. Claimant has failed to prove by a preponderance of the evidence that he suffered an accidental injury on June 19, 2008, arising out of and in the course of his employment. Claimant's testimony is not credible. Claimant's case has three principal problems: he had a preexisting history of similar nausea and dizziness, the restroom floor had no water or other substance causing a slip hazard, and claimant was found lying straight on his back with his arms and legs straight. It is unlikely that claimant would fall into such a position either from a slip or from dizziness. The trier-of-fact cannot say with any probability that claimant slipped on the floor and fell, causing injury. It is a possibility, but not a probability.

CONCLUSIONS OF LAW

1. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not.

Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant has failed to prove by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment.

ORDER

It is therefore ordered that Claimant's claim for compensation and benefits is denied and dismissed.

DATED: November 26, 2008 Martin D. Stuber